Supreme Court, U.S.
FILED
93 2015 JUN 16 1994
OFFICE OF THE CLERK

No. 93-

In The

Supreme Court of the United States

October Term, 1993

DENNIS T. DEMPSEY, RONALD E. SHAVER, RAYMOND E. YOUNG, A. W. FISH, G. W. GATTEN, RUSSELL N. ROGERS, R. J. WEBER, J. P. VALDEZ and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Petitioners,

v.

THE ATCHISON, TOPEKA and SANTA FE RAILWAY COMPANY, UNITED TRANSPORTATION UNION and J. G. BAILEY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

HAROLD A. ROSS
(Counsel of Record)
ROSS & KRAUSHAAR CO., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113-1740
(216) 861-1313

Counsel for Petitioners

QUESTION PRESENTED

Whether the provisions of the Railway Labor Act, 45 U.S.C. §151 *et seq.*, authorize an agreement by a rail carrier and the bargaining representative for train service employees requiring the collection of full monthly dues to that union from the wages of those employees, solely to maintain their numerical ranking on the seniority rosters of the train service crafts when they are working in the craft of locomotive engineers represented by a different union for collective bargaining purposes, which union those persons wish to support and to exclusively pay union shop dues or fees?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

Proceedings Below 2

Facts 7

REASONS FOR GRANTING THE WRIT 12

CONCLUSION 28

APPENDICES

APPENDIX A Decision By The United States Court of Appeals for the Seventh Circuit 1a

APPENDIX B Order Upon Consideration of Petition For Rehearing by The United States Court of Appeals for the Seventh Circuit 29a

APPENDIX C Memorandum Opinion and Order of U.S. District Court for the Northern District of Illinois ... 31a

APPENDIX D Excerpts From NLRA and RLA ... 45a

TABLE OF AUTHORITIES

Page

CASES:

Birkholz v. Dirks, 391 F.2d 289 (7th Cir. 1968), *vacated as moot*, 395 U.S. 210 (1969) 26

Brotherhood of Locomotive Engineers, et al. v. The Kansas City Southern Ry. Co. and United Transportation Union, United States Court of Appeals for the Eighth Circuit, Case No. 93-2944 13

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) 17

Gary D. Carr, et al. v. Chicago Central & Pacific R.R. Co. and United Transportation Union, United States District Court for the Northern District of Illinois, Civil No. 92-C-5943 13

Communications Workers v. Beck, 487 U.S. 735 (1988) 8, 12, 16

Connecticut Nat. Bank v. Germain, 503 U.S. ___, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992) 15

Ellis v. Broth. of Railway and Airlines Clerks, 466 U.S. 435 (1984) 8, 12, 16

Felter v. Southern Pacific Co., 359 U.S. 326 (1959) ..25, 26

Kidwell v. Transportation Communications Int'l Union, 946 F.2d 283 (4th Cir. 1992), *cert. denied*, 504 U.S. ___, 112 S. Ct. 1760, 118 L. Ed. 2d 423 (1992) 8

Mertens v. Hewitt Associates, 508 U.S. ___, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993) 15

NLRB v. General Motors Corp., 373 U.S. 734 (1963) 18

NLRB v. Manitowac Engineering Co., 909 F.2d 963 (7th Cir. 1990) 18

TABLE OF AUTHORITIES – Continued

Page

O'Connell v. Erie Lackawanna R.R., 391 F.2d 156 (2nd Cir. 1968), *vacated as moot*, 395 U.S. 210 (1969) 27

Pattern Makers' League v. NLRB, 473 U.S. 95 (1985) .. 12, 20

Pennsylvania R.R. Co. v. Rychlik, 352 U.S. 480 (1957) 7

Radio Officers' Union v. NLRB, 473 U.S. 95 (1954) 12, 18, 21

Texas and New Orleans R.R. Co. v. Broth. of Railway Clerks, 281 U.S. 548 (1930) 23

Trans World Airlines v. Flight Attendants, 489 U.S. 426 (1989) ..... *passim*

STATUTES:

Judicial Code

28 U.S.C. §1254(1) 2

28 U.S.C. §1291 5

28 U.S.C. §1331 3

28 U.S.C. §1337 3

28 U.S.C. §2201 3

National Labor Relations Act

29 U.S.C. §151 *et seq* 2, 5

Sec. 7, 29 U.S.C. §157 22

Sec. 8(a)(3), 29 U.S.C. §158(a)(3) ..... *passim*

Railway Labor Act

45 U.S.C. §151 *et seq.* 2

TABLE OF AUTHORITIES – Continued

Page

Sec. 1a, 45 U.S.C. §151a 22

Sec. 2 Fourth, 45 U.S.C. §152 Fourth ..... *passim*

Sec. 2 Eleventh, 45 U.S.C. §152 Eleventh 4, 7, 14, 15, 16

Sec. 2 Eleventh (a), 45 U.S.C. §152 Eleventh (a) 4, 5, 15

Sec. 2 Eleventh (c), 45 U.S.C. §152 Eleventh (c) ..... *passim*

Sec. 10, 45 U.S.C. §160 9

OTHER:

96 Cong. Reg. 15786 (1959) 16

96 Cong. Reg. 16267 (1950) 16

Public Law 102-29 9

Recommendations of Presidential Emergency Board No. 219 9

No. 93-___

In The

Supreme Court of the United States

October Term, 1993

DENNIS T. DEMPSEY, RONALD E. SHAVER, RAYMOND E. YOUNG, A. W. FISH, G. W. GATTEN, RUSSELL N. ROGERS, R. J. WEBER, J. P. VALDEZ and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Petitioners,

v.

THE ATCHISON, TOPEKA and SANTA FE RAILWAY COMPANY, UNITED TRANSPORTATION UNION and J. G. BAILEY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioners, Dennis T. Dempsey, Ronald E. Shaver, Raymond E. Young, A. W. Fish, G. W. Gatten, Russell N. Rogers, R. J. Weber, J. P. Valdez and Brotherhood of Locomotive Engineers, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on February 25, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 16 F.3d 832 (7th Cir. 1994), and the opinion of the District Court for the Northern District of Illinois is unofficially reported at 124 Lab. Cases ¶ 10,585 and 144 LRRM 2551. They appear in the Appendix (hereinafter designated "App.") at la-28a and 31a-43a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on February 25, 1994. App. la. A timely petition for rehearing and rehearing en banc was denied on April 1, 1994. App. 29a. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent sections of the Railway Labor Act ("RLA"), 45 U.S.C. §151 *et seq.*, along with selected excerpts from the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 *et seq.*, are set forth in full in the Appendix at pages 45a-52a.

STATEMENT

Proceedings Below

This case arises out of a dispute over a side letter agreement to a collective bargaining agreement between

respondent, The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe"), and respondent, United Transportation Union ("UTU"). UTU is the authorized collective bargaining representative of the Santa Fe operating employees, except for the craft of locomotive engineers represented by the Brotherhood of Locomotive Engineers ("BLE"). The agreement, known as Side Letter 11, required the Santa Fe to collect from the wages of train service employees, promoted and working in the craft of locomotive engineers, "full monthly dues" for UTU. If those employees failed to pay such dues, seniority credits in train service would not be awarded during any period they worked as locomotive engineers, thereby reducing their standing or ranking on the train service seniority rosters as to engineers/trainmen paying dues to UTU and all persons working as trainmen.

On August 7, 1992, eight train service employees, who hold seniority in and are employed for a substantial number of days during the year as locomotive engineers, along with the BLE, filed this action in the federal district court for the Northern District of Illinois for a declaratory judgment. Jurisdiction was based upon 28 U.S.C. §§1331, 1337, 2201 and the RLA. The complaint sought a declaration that Side Letter 11 violated the prohibition in Section 2 Fourth of the Railway Labor ("RLA"), 45 U.S.C. §152 Fourth, for any rail carrier "to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions,"

unless a qualified union shop under Section 2 Eleventh (a) of the RLA, 45 U.S.C. §152 Eleventh (a), or alternatively contravened Section 2 Eleventh (c) of the RLA which specifies that payment of dues or agency fees to either BLE or UTU satisfies any union shop requirement that could be imposed upon locomotive engineers or train service employees as a condition of maintaining seniority and employment rights. The complaint also requested an injunction issue to prevent application of the agreement and to protect against interference with the employees' federally protected rights of complete freedom of choice to join and pay dues to or not join a union and freedom from compulsory dual unionism.

The district court denied petitioners' request for declaratory and injunctive relief, and granted summary judgment to UTU and judgment on the pleadings to Santa Fe. App. 43a. The district court first held that the agreement was not a union shop agreement under Section 2 Eleventh, 45 U.S.C. §152 Eleventh, because Side Letter 11 did not make reference to the payment of dues as a "condition of employment", but "merely requires a Santa Fe employee working in engine service to pay dues to the UTU if he or she wishes to continue to accrue train service seniority while working outside of the train service craft." App. 37a. Accordingly, it held that Side Letter 11 did not violate Section 2 Eleventh (c), even though it could promote "compulsory dual unionism" and access to the benefit of continued accrual of train service seniority "may tempt BLE employees to begin paying dues to UTU, or to join UTU outright". App. 39a. Further, it held that payment of fees for the protection of seniority

ranking did not violate the prohibition upon the collection of fees and dues contained in Section 2 Fourth or Santa Fe's obligation of neutrality because (1) Section 2 Fourth is "directed particularly at control over the initial step in collective bargaining – the determination of the employees' representatives", and (2) decisions under the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, supporting petitioners' position were inapposite due to a difference "between the two statutes on the question of the encouragement or discouragement of union membership." App. 41a-42a.

The Court of Appeals, which had jurisdiction under 28 U.S.C. §1291, affirmed. Initially, it found that the prohibitions in Section 2 Eleventh (c) against dual unionism only kick in when the agreement at hand purports to be a union shop agreement authorized by Section 2 Eleventh (a), and "nothing on the face of Side Letter 11 . . . establishes any conditions of continued employment in the train service craft upon the making of monthly payments to the UTU"; therefore, "this Side Letter agreement entered into between Santa Fe and UTU is wholly outside the realm of Section 2, Eleventh (c)." App. 14a-15a. Rejecting petitioners' facial challenge to Side Letter 11, the court below also rejected petitioners' contention that the dues requirement results in a *de facto* condition of employment because the payment satisfies both the requirement of UTU dues in the Side Letter and the requirement of dues payments in the existing UTU-Santa Fe union shop agreement and, in addition, forces transferred employees to pay dues to UTU in order to retain their current position on the train service seniority roster and their ability to hold jobs in train service. App.

17a-19a. In a spasm of convoluted reasoning based upon the principle that seniority rights are subject to modification, and forgetting that any such modification is subject to the union's duty of fair representation, as well as overlooking the ebb-and-flow between the engineers and train service crafts, the court held that Section 2 Eleventh (c) only guarantees that "transferred employees will not be forced to join multiple unions", and does not guarantee the continuation of the accruing of seniority in a craft other than the one in which the person is currently employed. App. 18a-19a. Concluding Side Letter 11 "provides an additional benefit to those transferred train service employees who choose to pay dues to the UTU; the continued accrual of seniority," the court said that while this could tempt transferred trainmen who are members of BLE to change membership to UTU, "[t]his is not the same, however, as being forced to do so as a condition of continued employment." App. 19a. The Court of Appeals rejected the claim that the seniority maintenance payments violated Section 2 Fourth of the RLA, 45 U.S.C. §152 Fourth, on the basis that Section 2 Fourth is the ground for judicial intervention in post-certification actions only when anti-union animus or hostility to unions in general has been established, and that the case law developed under Section 8(a)(3) of the NLRA, 29 U.S.C. §158(a)(3) need not be resorted to, because applicable case law under the RLA was sufficient for its determination. App. 21a.

Facts

Since 1985, the source of locomotive engineers has been the employees in the train service crafts, *i.e.*, conductors, brakemen and yardmen. The former are represented by BLE, the latter by UTU.

The individual petitioners are employees of Santa Fe working as locomotive engineers. Each obtained seniority as engineer at various times after 1979. Each came from the ranks of train service and continue to hold seniority and employment rights in train service. App. 5a, 6a. As a result of their junior standing in the engineers' craft, their employment rights as trainmen are important to them. These junior engineers are the first furloughed in the case of a reduction in the number of engine service crews and accordingly ebb-and-flow between the craft of locomotive engineers and the train service crafts in order to obtain work. App. 17a. *See also Pennsylvania R.R. Co. v. Rychlik*, 352 U.S. 480, at 490 (1957), for a description of the shuttling between crafts. Each of the employees were members of BLE, or desired to pay dues or fees to BLE and not to UTU. App. 5a.

Until 1951, Section 2 Fourth of the RLA prohibited any type of agreement for collection of any dues, fees, assessments or other contributions payable to a labor organization. In 1951, Congress enacted the union shop amendment to the RLA (64 Stat. 1238), which legalized a limited form of union shop for railroad employees, 45 U.S.C. §152 Eleventh. Following the amendment, the four predecessor unions of UTU and BLE entered into union shop agreements on most of the nation's railroads. These agreements copied the language of Section 2 Eleventh (c),

permitting membership in any of the five standard railway operating unions to satisfy the requirement imposed in the agreement. In effect, those agreements were applied so as not to require, for example, any operating employees[1] of Santa Fe to join or maintain membership in UTU, or its predecessors, so long as they were members of BLE or another of UTU's predecessor operating employee unions. Regardless of which craft he or she was working in, an operating employee only had to make payments or belong to either BLE or UTU.[2]

However, the conclusion of the 1988-1991 round of national negotiations between the nation's railroads represented by the National Railway Labor Conference, which included Santa Fe, and almost all of the nation's standard railway labor organizations, changed this tranquil setting. The railroads and unions were unable to settle their numerous differences in separate negotiations.

---

[1] There are five crafts of "operating employees": locomotive engineers, locomotive firemen, hostlers and hostler helpers; conductors; brakemen and switchmen. Locomotive engineers and firemen are often referred to as "engine service" employees; conductors, brakemen and switchmen are generally called "train service" employees or "ground service" employees.

[2] As a result of the Court's decision in *Ellis v. Brotherhood of Railway and Airline Clerks*, 466 U.S. 435 (1984), and the decision of *Kidwell v. Transportation Communications Int'l Union*, 946 F.2d 283 (4th Cir. 1992), *cert. denied*, 504 U.S. ___, 112 S. Ct. 1760, 118 L. Ed. 2d 423 (1992), it is clear that a railroad employee need not belong to the union but can pay it "agency fees." While the RLA and NLRA permit agreements requiring all employees to become union members as a condition of continued employment, "the 'membership' that may be so required has been 'whittled down to its financial core' ". *Communication Workers v. Beck*, 487 U.S. 735, 745 (1988).

Then-President Bush appointed Presidential Emergency Board No. 219 ("PEB") to conduct an investigation and issue recommendations pursuant to Section 10 of the RLA, 45 U.S.C. §160, on the various disputes. Following hearings, the PEB recommended, *inter alia*, that UTU negotiate agreements with the individual railroads reducing the number of train service employees in an operating crew. App. 4a. Notwithstanding the PEB's recommendations, the various unions and railroads remained at loggerheads on the common and separate issues in each dispute. Through the passage of Public Law 102-29, on April 18, 1991, Congress then imposed the recommendations of PEB 219 as if they were agreements between the railroads and each of the involved unions. *Ibid.*

In accordance with the legislated agreement applicable to the train service crafts, Santa Fe and UTU met and adopted a crew consist agreement on July 6, 1992, which provided for the elimination of train service positions and the separation of train service employees from Santa Fe employment through buyouts. *Ibid.*[3] The train service crews were reduced from three employees to two and even one trainman.

Although neither union shop provisions nor contributions to unions, and their attendant costs of collection to rail employers, were matters before the PEB or referred to in its recommendations to the President, UTU and Santa Fe entered into Side Letter 11 as part of the crew

---

[3] Contrary to the opening sentence in the opinion of the Court of Appeals, the side letter and subsequent suit did not take place "in the midst of a threatened national railway strike." App. 2a.

consist agreement. App. 4a-5a. Side Letter 11 placed the following requirement on payment of dues by a train service employee who already had transferred to or would in the future transfer to engine service:

> Ground Service employees who have transferred or transfer to engine service will not continue to accumulate ground service seniority unless they satisfy the following condition.
>
> > *Full dues* to the United Transportation Union will be required of such employees in order for them to continue accumulating ground service seniority.
>
> * * *
>
> Ground service employees failing to pay *full monthly dues*[4] to the UTU after transferring to engine service will not thereafter accumulate any additional conductor, brakemen or yardmen seniority, and thus will fall on any relevant conductors', trainmen's or yardmen's roster below persons who do continue to accumulate such seniority. (Emphasis supplied). App. 5a, at n.2.

---

[4] "Full monthly dues" includes payments to the UTU's International, UTU's Genera1 Committee of Adjustment on Santa Fe, the local division and $10.00 monthly to UTU's legislative board, if any, within the state in which the individual's local division is located. Neither the court below or respondents acknowledged or explained the manner in which the seniority protection fee is earned by each of these separate units or the hardship (other than possible monetary) imposed upon them by the individual's transfer to engine service, particularly when he or she could choose to retain membership in UTU.

By reason of the agreements between Santa Fe and UTU, an individual trainman cannot relinquish his or her rights to become an engineer but is forced to take promotion. Under the provisions of the union shop agreement, which incorporates the provisions of Section 2 Eleventh (c) of the RLA, the individual need not pay dues to UTU as a trainman, even though the employee is working in that craft, receives the benefit of its provisions, and is subject to UTU's enforcement of that agreement – membership in BLE is legally sufficient. By reason of Side Letter 11, however, upon being compelled to take promotion into and when working in the craft of locomotive engineers represented by BLE, the engineer-trainman must pay full dues to the UTU, which cannot negotiate any agreements governing the employee's rates of pay, rules and working conditions, cannot protect the individual's seniority as an engineer, and cannot handle his or her grievances arising in the engineers' craft, if the employee wishes to retain his current trainmen's seniority ranking.

Notwithstanding the fact that Side Letter 11 "has provided an additional benefit to those transferred service employees who choose to pay dues to UTU, the continued accrual of seniority [in the train service crafts]," and, therefore, would very well "tempt transferred trainmen who currently are members of BLE to satisfy their Santa Fe-UTU union shop obligations by paying their monthly dues to UTU," the lower court held there could be no violation of Section 2 Eleventh (c), because the side letter is not a union shop agreement in that the engineers-trainmen were not being forced to pay monthly dues to UTU "as a condition of continued

employment," *i.e.*, to prevent termination. App. 14a. Under the circumstances, the court below considered the individual petitioners have a viable freedom of choice that could not lead to dual unionism.

Further, the Court of Appeals held that the side letter was not barred by the language of Section 2 Fourth of the RLA prohibiting a carrier from deducting, collecting or assisting "in the collection of . . . dues, fees, assessments, or other contributions" for a labor organization, because the only basis for intervention under the statutory provision would be direct evidence of "anti-union animus with respect to Side Letter 11," and any contrary case law under Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3), was inapplicable, since case law under the RLA is sufficient for our determination that Side Letter 11 is not barred by Section 2, Fourth." App. 21a-24a.

REASONS FOR GRANTING THE WRIT

The decision below is in direct conflict with the specific language of the applicable statutory provisions and with the decision of this Court in *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954), as confirmed in *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985), and *Communication Workers v. Beck*, 487 U.S. 735 (1988), and *Ellis v. Broth. of Railway and Airline Clerks*, 466 U.S. 435 (1984). Moreover, it misconceives the doctrine of *Trans World Airlines v. Flight Attendants*, 489 U.S. 426 (1989), and extends it beyond the parameters of its application as specified by the Court's opinion. And its rationale creates confusion

and uncertainty as to the limits of the authority under the RLA of a railroad and one of its employee representatives to require employees to belong to a union and to pay it "full monthly dues." The issue presented is of major importance, requiring the balancing of the interests of the carrier and one of its employee representatives in negotiating agreements that reduce the labor costs of the carrier in return for protecting the financial interests of that union against the individual employees' interests in freedom of association and choice as to union selection and in freedom from compulsory dual unionism, which interests necessarily clash in a manner leading to potential industrial discord and the disruption of interstate commerce. The agreement, and the decision sustaining it, serve to upset the inherent statutory forces or accommodations which have balanced the competing interests of the employee organizations representing railroad operating employees and have reduced the traditional tensions arising from the ebb-and-flow of employees between those crafts. The importance of the issue is magnified by the fact that the respondent union entered into seniority protection fee arrangements with two other carriers, which are before the courts in *Brotherhood of Locomotive Engineers, et al. v. The Kansas City Southern Ry. Co. and United Transportation Union,* United States Court of Appeals for the Eighth Circuit, Case No. 93-2944, and *Gary D. Carr, et al. v. Chicago Central & Pacific R.R. Co. and United Transportation Union,* United States District Court for the Northern District of Illinois, Civil No. 92-C-5943. On May 26, 1994, opinions were issued in both cases, which followed the reasoning of the lower court in this case. Most assuredly, UTU will seek to extend those dues

schemes to other railroads in the round of railroad negotiations coming up in 1995, and BLE will feel compelled to reciprocate, thereby leading to forced dual unionism.

This case involves an important question of federal labor relations law which until this case had never been decided under the RLA, but had been decided under the NLRA in a definitely different manner from the opinion below. That question is whether railroad employees, unlike employees covered by the NLRA, must first clearly prove in union fee situations that the carrier employer is biased in support of one union and is attempting to detract from or eliminate the majority status of the other union in order to maintain their action to enforce their individual rights of association statutorily mandated by the RLA. For these reasons, review by this Court is warranted.

1. Side Letter 11 is absolutely prohibited by the language of Section 2 Fourth of the RLA, which states in pertinent part that it "shall be unlawful for any carrier . . . to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions. . . . " The only exceptions in Section 2 Fourth to this absolute prohibition upon carrier-union activities, such as Side Letter 11, are contained in the proviso following the quoted language, which are not applicable to the instant situation, and the union security and check-off agreements permitted since 1951 by Section 2 Eleventh. App. 49a.

In order to comply with Sections 2 Fourth and Eleventh, Side Letter 11 has to be a union security agreement within the meaning of Section 2 Eleventh (a). That provision permits carriers and labor organizations under the RLA "to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is later, all employees shall become members of the labor organization representing their craft or class. . . . " However, as found by the courts below, Side Letter 11 does not conform in any manner with that subsection, for it is not an agreement "requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class."

In short, the RLA makes no provision for seniority maintenance dues payments and for the collection thereof by railroads. If the reasoning expressed below is followed, however, the lower courts will have rewritten the statute. As the Court expressed in *Connecticut Nat. Bank v. Germain*, 503 U.S. ___, 112 S. Ct. 1146, 1149, 117 L. Ed. 2d 391, 397 (1992), "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." The "plain meaning" of the statute is that this dues collection scheme must qualify as a union security agreement under Section 2 Eleventh and, if it does not, it is invalid. *See, e.g., Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S. Ct. 2063, 2070-2071, 124 L. Ed. 2d 161, 173-174

(1993). The decision below, therefore, departs from the rules of statutory construction as set forth by this Court, and presents a question of law that is novel under the RLA and worthy of review.

2. The decision below is in direct conflict with the pronouncements of the Court in *Ellis v. Broth. of Railway and Airlines Clerks*, 466 U.S. 435 (1984), and *Communications Workers v. Beck*, 487 U.S. 735 (1988), that the union shop agreement provisions of the RLA, 45 U.S.C. §2 Fourth and Eleventh, are the statutory equivalents of Section 8(a)(3) of the NLRA, 29 U.S.C. §158(a)(3), and should be applied in a uniform manner and, therefore, are compelling precedent in cases arising from application of the sister statute. In part, the legislative history of Section 2 Eleventh of the RLA establishes that it was intended to have the same meaning and application as Section 8(a)(3) of the NLRA. During the course of considering S.3295, the bill amending the RLA in 1951 to permit union shop agreements, the floor manager, Senator Hill said in response to questioning, "In the limitations imposed and the nature of the right granted, the bill closely follows the pattern of parallel provisions of the Taft-Hartley Act." 96 Cong. Rec. at 15786 (1950). Along the same lines, Senator Hill later stated: "The bill would grant to employees in the railroad industry a right which parallels a right already granted to employees in other industries under the Taft-Hartley law." 96 Cong. Rec. 16267 (1950).

Thus, in *Communications Workers v. Beck*, 487 U.S. 735, at 745-747 (1988), the Court said:

> Because the NLRA and RLA differ in certain crucial respects, we have frequently warned that decisions construing the latter often provide

> only the roughest of guidance when interpreting the former. *See, e.g., supra,* at 743; *First National Maintenance Corp. v. NLRB,* 452 U.S. 666, 686, n.23 (1984). Our decision in *Street,* however, is far more than merely instructive here: we believe it is controlling, for *§8(a) (3) and §2, Eleventh are in all material respects identical. Indeed, we have previously described the two provisions as "statutory equivalent[s],"* *Ellis v. Railway Clerks,* 466 U.S. 435, 452 n.13 (1984), and with good reason, because their nearly identical language reflects the fact that in both Congress authorized compulsory unionism only to the extent necessary to ensure that those who enjoy union-negotiated benefits contribute to their cost. Thus, in amending the RLA in 1951, Congress expressly modeled §2, Eleventh on §8(a)(3), which it had added to the NLRA only four years earlier, and repeatedly emphasized that it was extending "to railroad labor the same rights and privileges of the union shop that are contained in the Taft-Hartley Act." 96 Cong. Rec. 17055 (1951) (remarks of Rep. Brown). In these circumstances, *we think it clear that Congress intended the same language to have the same meaning in both statutes.* (Emphasis supplied) (Footnotes omitted).

In light of the expressions of the Court that the decisions construing the union security provisions under the two statutes are applicable to each other, the lower courts' reliance upon the exception described in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369 (1969), is misplaced, for in these provisions there are no "differences between the statutory schemes." *See Trans World Airlines, Inc. v. Flight Attendants,* 489 U.S. 426

at 439 (1989), quoting *Railroad Trainmen v. Jacksonville Terminal*, 394 U.S. *supra*, at 383.

It, therefore, follows that the NLRA authorities, such as *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954), and of the National Labor Relations Board, such as cited by the Court in *NLRB v. General Motors Corp.*, 373 U.S. 734, at 739 (1963), and by the Seventh Circuit in *NLRB v. Manitowac Engineering Co.*, 909 F.2d 963 (7th Cir. 1990), are fully applicable to this case. Based upon the statutory equivalent found in *Beck*, the NLRA decisions are relevant to the employees' union shop claim and also their claim comparable to a Section 8(a)(3) discrimination case. Furthermore, in deciding the issue that discriminatory intent was not required in a Section 8(a)(3) case in *Radio Officers*, the Court established that any effect upon any employment relationship, including seniority ranking, which causes the individual to receive a benefit or suffer some detriment, thereby tending to coerce the individual into paying dues, joining the union, or becoming a union advocate or supporter, is sufficient to constitute a violation. The opinions in these cases refer to accrued seniority in the sense of ranking or standing on the roster. In *NLRB v. Manitowoc Engineering Co., supra*, for instance, the individuals violating the payment requirement, as here, had their seniority, and right to work "diminished," not extinguished, by their transfer or promotion. Here, there would be a loss of numerical standing on the seniority roster, with a concomitant loss of job security and loss of the chance to work, which the court below found insufficient to constitute a "condition of continued employment."

3. Moreover, the decision below misapplies the Court's decision in *Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. 426 (1989). That case is cited for two propositions that the lower court advanced as establishing that "Side Letter 11 is not barred by Section 2, Fourth." App. 21a.

First, the lower court stated that *Trans World Airlines, supra*, held that Section 2 Fourth primarily addresses "the precertification rights and freedoms of unorganized employees," and, therefore, any "post-certification" controversies were not entitled to the protections of Section 2 Fourth unless there was an adequate showing of anti-union animus or "where the plaintiff can show that the employer's actions strike a fundamental blow to union or employer activity and the collective bargaining process itself. *Trans World*, 489 U.S. at 442." App. 22a, 23a. Based upon the premise that Section 8(a)(3) of the NLRA and Section 2 Fourth of the RLA were not parallel provisions and the view of *Trans World* and case law under the RLA as always requiring a specific showing of anti-union animus, the court below also held that *Trans World* required it to not "resort to the NLRA at all, for applicable case law under the RLA is sufficient for our determination that Side Letter 11 is not barred by Section 2, Fourth." *Id.*, 21a.

We submit that this analysis stretched the Court's opinion in *Trans World* beyond its limits and, therefore, misapplied it. The very specific language in Section 2 Fourth relied upon in this case was not involved in *Trans World*. The opinion below never even discussed that language. Moreover, the court below failed to note that seven of the first eleven pages of this Court's opinion in

Trans World did consider "the analogies from the federal common labor developed under the NLRA." 489 U.S. at 432. There was no blanket rejection of NLRA precedent as by the Seventh Circuit in this case. When the Court did discuss the RLA and its precedents, it was in the context of that union's argument to take any ruling on strike crossovers under the RLA *"beyond* the limitations even imposed by the NLRA." *Id.*, 440. Upon the Court's analysis of the language of Section 2 Fourth applicable to that legal issue and its understanding that judicial intervention in RLA procedures was limited to those cases where there would otherwise be no remedy to enforce the statutory commands (*id*, 441), the Court saw "no basis in §2 Fourth for prohibiting the crossover policy employed by TWA once bargaining had reached an impasse." *Id.*, 442. Contrary to the lower court's reading of the decision, the Court concluded: "Neither the RLA itself nor any analogies to the NLRA indicate that the crossover policy adopted by TWA during the period of self-help was unlawful." *Id.*, 443.

Here, however, the analogies are on point. The phrase "conditions of continued employment" in the NLRA cases is defined as something significantly less than "termination of employment" which the court below found to be the sole statutory condition. The Court has rejected as "unpersuasive" the argument that provisions like that at bar "do[ ] not interfere with workers' employment because offending members are not discharged." *Pattern Makers' League v. NLRB*, 473 U.S. 95, 107 (1985).

Moreover, in union dues collection cases, unlike *Trans World Airlines* and its progeny cited in the opinion below, "specific evidence of intent to encourage or discourage

[union membership] is not an indispensable element of proof of violation of 8(a)(3)." *Radio Officers' Union v. NLRB*, 347 U.S. *supra*, at 44. On this point, in terms applicable to this case, the Court said:

> This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct. [Citations omitted]. Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage is sufficiently established.

Id., 45 (Footnotes omitted). In fact, disparate wage treatment and differences in the treatment of seniority are examples of "discrimination so foreseeably causing employee response as to obviate the need of any other proof of intent." *Id.*, 46.

Even though the use of the phrase "full monthly dues" in Side Letter 11 conveys the meaning that engineers-trainmen can satisfy their union shop and seniority maintenance fee through one payment to UTU, which serves to encourage the individual to belong to UTU, rather than BLE, as an obviously "natural and foreseeable consequence" of the obligation imposed under the standard set forth in *Radio Officers' Union* (*id*, 42), the lower court refused to find Side Letter 11 "must be presumed to have intended such encouragement." App. 26a. Instead,

the Seventh Circuit read *Trans World* as being contrary to *Radio Officers,* notwithstanding the Court's direction in *Trans World* that Sections 2 Third and Fourth are to be enforced by the federal courts as to postcertification matters where the improper measure "prevent[s] the scheme of the RLA from working," or is "*inherently destructive* of union or employer activity." *Trans World Airlines, Inc. v. Flight Attendants,* 489 U.S. *supra,* at 442.

We submit that the opinions in *Trans World* and *Radio Officers* are in harmony as to the instant situation. The scheme of Side Letter 11 clashes with two principles of the RLA, which are also encompassed in the NLRA and which were followed in *Radio Officers*: The employees' freedom of association and choice of representation and the furtherance of stable collective bargaining relationships. *Compare* Sec. 7, NLRA, and Sec. 1a, RLA. App. 45a, 47a. Just as the arrangements in *Radio Officers* "inherently encourage[d] or discourage[d] union membership" and, therefore, violated the NLRA, Side Letter 11 accomplishes the same result and, therefore, "prevent[s] the scheme of the RLA from working" and further is "inherently destructive" of the employees' statutory rights under the RLA. By concluding that petitioners were required to produce substantial evidence that Santa Fe intended to do BLE in or that respondents conspired to have UTU replace BLE, the Seventh Circuit stretched *Trans World* beyond its limits. While priority for jobs to strike replacements and crossovers may have been "a lawful exercise of peaceful economic power", the encouragement of membership in one union over another or the entry of any device, such as inducing the collection of payments for one union, is not a lawful exercise of the employer's

economic power. App. 27a. For all intents and purposes, respondent UTU stands in no better position than the company union in the dispute between the railroad and a second union in *Texas and New Orleans R.R. Co. v. Broth. of Railway Clerks*, 281 U.S. 548 (1930).

Petitioners submit that this is an appropriate case in which to determine whether any postcertification claims arising out of employer or union activity, which is specifically barred by the language of Section 2 Fourth, properly lies against a rail carrier and union in the same posture as Santa Fe and UTU and can be heard and decided on the merits by the federal courts, when there is no other forum available that has the potential to remedy the interference or intimidation.

4. In addition, contrary to the reasoning below, Side Letter 11 is part of a union shop arrangement. It is a union shop even though refusal to join or pay an agency fee to UTU is not grounds for termination of employment. It is a union shop agreement when one looks at the "full monthly dues" as a signal or euphemism for "payment will satisfy your requirements under both the union shop and Side Letter 11." It is a union shop from the vantage of the individual who could lose employment opportunities when furloughed as a locomotive engineer, and even his job with Santa Fe, if he does not pay "full monthly dues." It is a union shop since it encourages membership in and payment of full monthly dues to UTU.

The language of Section 2 Eleventh (c) is clear and unequivocal. In pertinent part, it provides:

> The requirement of membership in a labor organization * * * shall be satisfied, as to both a

> present or future employee in engine, train, yard or hostling service * * * if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter, and admitting to membership employees of a craft or class in any of said services; * * * Provided, however, that as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft in class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: Provided, further, that nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

There could hardly be a more exact statement that the only instance in which a union representing train service employees can require an employee to join or pay dues to that union, as opposed to one of the other unions national in scope representing operating employees, is when that employee is not a member of any such union on the effective date of the initial union shop agreement. Only in that event, may an employee be required to join the contracting union.

Even such an employee, as well as all other employees, may thereafter at any time change membership to any other union, national in scope and admitting to membership operating employees, without being out of compliance with the membership requirement of a valid union shop agreement. This is expressly provided in the last proviso of Section 2 Eleventh (c). In *Felter v. Southern Pacific Co.*, 359 U.S. 326, 336-337 (1959), a Section 2 Eleventh (b) dues check-off case, the Court relied upon the last proviso as setting forth "the areas that the Act leaves open for solicitation by rival organizations" and "the area where even a worker under a union shop arrangement can change affiliations."

The Trainmen's Union, one of UTU's predecessors, had entered into a contractual arrangement with Southern Pacific which required the use of a prescribed form, which had to be obtained from that union, if the employee wished to revoke his check-off and join the alternate organization in satisfaction of the union shop requirements. The Court held that this kind of arrangement, while insignificant in appearance, was contrary to the Congressional policy and had a chilling effect on permissible membership. Therefore, the Court held the contractual arrangement illegal and violative of the RLA stating (*id.*, 337-38):

> There may well be a difference in the weight of persuasion necessary to enlist the worker if he cannot at once effectuate his intentions through papers furnished him on the spot by the recruiting organization. We do not say whether the "cooling off" period which the procedure insisted upon here creates would be wise or unwise

> as a matter of policy. It is enough to say that we believe the Act has not left any place for it.

Here, the employee is placed in the same dilemma which effectively restricts any change in union affiliations. Side Letter 11 is no different than the check-off in *Felter*, because the additional requirement is so integrally a part of the union shop requirements that it serves to threaten and coerce employees to become members of UTU rather than belonging to the rival or alternate organizations recognized and sanctioned by the RLA as the representatives of the operating crafts of railroad employees. The rationale of *Felter* establishes that Side Letter 11 is burdensome upon free association, completely unreasonable, and contrary to the explicit language of Section 2 Eleventh (c).

About ten years later, the same union, representing the trainmen, wrote union shop agreements providing that membership in the alternate unions would not satisfy the union shop requirements, if the employee did not have interchangeable seniority rights in another operating craft for which the alternate union was the craft representative. The Seventh Circuit in *Birkholz v. Dirks*, 391 F.2d 289 (7th Cir. 1968), *vacated as moot*, 395 U.S. 210 (1969), saw through this strategy and found those limitations void as violative of Section 2 Eleventh (c). After reviewing the legislative history of Section 2 Eleventh (c), the court said in terms equally applicable to the case at bar:

> We think it absurd to interpret away the literal language of 2 Eleventh (c) by reading it as though it said almost exactly what was said in a

> proposal which was rejected at committee hearings and which places members of SUNA – organized under the Act and national in scope and covering the craft of yard services in the dilemma of choosing between compulsory dual unionism or a compulsory change from their own craft union to the Trainmen. Each horn of this dilemma was rejected by Congress in 1950. (*Id.*, 292).

The Court noted that Section 2 Eleventh (c) was drafted to permit minority unions and to sanction the employees' freedom of choice in selecting membership, for otherwise the elimination of such membership rights would destabilize peaceful relations by promoting the abrogation of an agreement between the operating brotherhoods which had guided their relations for years. *Ibid.* In summary, that court said:

> We believe that the railroad unions responsible for Sec. 2 Eleventh (c), and Congress deliberately chose to avoid the dangers of dual unionism by the method outlined in the literal language of Sec. 2 Eleventh (c) in order to provide clear and unequivocal protection from compulsory dual union membership, and also to avoid upsetting the balance of union power between the majority union bargaining agent and substantial minority union members within the bargaining unit. (*Ibid*).

This reasoning also caused the Second Circuit to follow the ruling in finding a similar scheme invalid in *O'Connell v. Erie Lackawanna R.R.*, 391 F.2d 156 (2nd Cir. 1968), *vacated as moot*, 395 U.S. 210 (1969). In fact, the Second Circuit pointed out that Congress "understood the bill [containing §2 Eleventh (c)] to make membership

in any of the unions sufficient." *Id.*, 161. This Court granted certiorari in both cases, which orders were vacated upon the merger of the unions into UTU.

Until now, all the courts confronting this situation have found that the union shop amendments permit the individual employee to have "the choice of operating union to which he will belong" and eliminate any chance that the employee would be required to pay dues to two unions. Here, Side Letter 11 places the employee in that dilemma – what the Second Circuit described as an "evil" – the employee would no longer have free choice but could be subject to compulsory dual unionism.

Clearly, the lower court's key premise for its conclusion that Side Letter 11 is outside the coverage of Section 2 Eleventh must fail. If that decision indeed creates an exception from Section 2 Eleventh (c) for some agreements calling for "full monthly dues" payments, to support a specific union over another qualified union, then the questions raised herein are of even greater importance and significance than merely whether the carrier may lawfully exercise its economic power in that fashion as held by the court below.

CONCLUSION

The decision below is in direct conflict with decisions of this Court and distorts the holding and rationale of *Trans World Airlines*. It raises fundamental questions concerning employer-union powers and actions vis-a-vis individual railroad employees' freedom of union choice and freedom from paying compulsory union fees, as

affected by the implications of *Trans World Airlines*. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

HAROLD A. ROSS
(Counsel of Record)
ROSS & KRAUSHAAR CO., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113-1740
(216) 861-1313

Counsel for Petitioners

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 93-1085

DENNIS T. DEMPSEY, RONALD E. SHAVER, RAYMOND E. YOUNG, et al.,

Plaintiffs-Appellants,

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, UNITED TRANSPORTATION UNION, and J.G. BAILEY, as General Chairman of United Transportation Union,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 5865-Harry D. Leinenweber, *Judge.*

ARGUED SEPTEMBER 9, 1993 – DECIDED FEBRUARY 25, 1994

Before FLAUM and MANION, *Circuit Judges,* and REYNOLDS, *District Judge.**

---

* Hon. John W. Reynolds, District Judge for the Eastern District of Wisconsin, is sitting by designation.

MANION, *Circuit Judge.* In the midst of a threatened national railway strike, the plaintiffs, BLE and eight engineers employed by Atchison, Topeka, and Santa Fe Railway Company (Santa Fe), filed suit to preliminarily enjoin the enforcement of a side letter agreement to a collective bargaining agreement executed between Santa Fe and the United Transportation Union (UTU). The challenged agreement required UTU members who wanted to accrue additional seniority to pay monthly dues to UTU even though they had transferred to an engineer position under the jurisdiction of the BLE. The district court denied plaintiffs' request for declaratory and injunctive relief, and granted summary judgment to UTU and judgment on the pleadings to Santa Fe. We affirm.

I. Background

Santa Fe is an interstate railway carrier within the meaning of Section 1 of the Railway Labor Act (RLA), 45 U.S.C. §151 *et seq.* Like most railroads, Santa Fe has collective bargaining agreements with different unions who represent the various categories, or "crafts," of train employees. One such union is the UTU. UTU is the exclusive bargaining representative for the train service craft,[1] which includes Santa Fe's conductors, brakemen, and

---

[1] We note that throughout the parties' briefs, as well as several materials included in the record, the terms "train service" and "ground service" are used interchangeably to refer to the same group of employees, notably, conductors, brakemen, and switchmen. For the sake of clarity, in referring to this group of employees, we will only use the label "train service."

switchmen. BLE is the exclusive bargaining representative for the engine service craft, which consists of Santa Fe's engineers.

Santa Fe and UTU have long been parties to collective bargaining agreements. Under an agreement between Santa Fe and UTU, dated September 1, 1966, train service employees first obtained seniority through date of hire or first service in the craft and then maintained seniority standing by the terms of the collective bargaining agreement. The agreement also provided that even if an employee leaves the train service crafts for any period of time he would continue to accumulate seniority. Also as is common in these railroad agreements, the 1966 Santa Fe-UTU agreement contained a union shop provision, that is, an agreement requiring as a condition of continued employment that employees join the union designated as their authorized bargaining representative. The agreement also provided that this union shop provision is satisfied if the employee is a member of any labor organization national in scope organized in accordance with the RLA and which admits as members employees in the train service or engine service crafts. Thus, membership in the UTU or the BLE satisfied the union shop.

The question before us began in 1988, when Santa Fe, BLE, and UTU were parties to a round of negotiations between the nation's railroads and railway labor unions. Apparently the railroads, including Santa Fe, wanted to reduce the number of workers required on each train, known as the "crew consist." The parties were not so much in disagreement with the notion of reducing the

crew as they were the method of achieving such reduction; the unions wanted to use attrition whereas the railroads wanted to reduce the excess employees' wages. The parties were unable to unable to [sic] reach an agreement during these negotiations which led to threats of a nation-wide strike on the part of the railway unions. To break this deadlock, then-President Bush, by Executive Order 12714, appointed the Presidential Emergency Board 219 to investigate the dispute and to report its findings. The Emergency Board reported, among other things, that the railroads had made a valid proposal to reduce the crew consist, but that the parties should bargain this matter locally, not nationally.

Despite the Emergency Board's recommendations, some of the railroads and unions were unable to reach agreement. As a result, eleven railroad unions, including UTU, went on strike against most of the nation's major railroads, including Santa Fe. To avert a nation-wide railway strike, the Congress, on April 18, 1991, passed Public Law Number 102-29 which made the recommendations of the Emergency Board binding upon the parties. In accordance with the legislated agreement, UTU and Santa Fe went back to the bargaining table and adopted a crew consist agreement on July 6, 1992. Under the agreement, UTU agreed to the elimination of certain train service positions and the separation of train service positions through buyouts. In addition to this agreement, UTU and Santa Fe also executed a side letter agreement to the crew consist agreement, known as Side Letter No. 11, which provided that train service employees who were transferred to engine service and who wished to continue accumulating additional seniority in train service, must

pay monthly dues to the UTU,[2] Prior to the execution of Side Letter 11, seniority accumulated even when an employee in the train service craft was transferred to and joined a different union.

The BLE and eight engineers challenged the validity of Side Letter 11 and brought this action in the district court requesting preliminary as well as declaratory relief. According to plaintiffs, Side Letter 11 is illegal under Section 2 Eleventh (c) of the RLA because it effectively requires transferred train service employees to become members of multiple unions. As stated earlier, plaintiffs include four members of the UTU currently working in engine service who want to become members of the BLE, and four non-members of UTU who are already members of the BLE and are working in engine service. Plaintiffs argue that although their membership in the BLE should

---

[2] The relevant portions of Side Letter 11 provided:

> Ground service employees who have transferred or transfer to engine service will not continue to accumulate ground service seniority unless they satisfy the following condition. Full dues to the United Transportation Union will be required of such employees in order for them to continue accumulating ground service seniority.
>
> * * *
>
> Ground service employees failing to pay full monthly dues to the UTU after transferring to engine service, will not thereafter accumulate any additional conductors, brakeman or yardman seniority, and thus will fall on any relevant conductors', trainmen's or yardmen's roster below persons who do continue to accumulate such seniority.

R. 1, Ex. A.

be sufficient to satisfy the 1966 UTU-Santa Fe union shop agreement, Side Letter 11 will effectively force them to also become members of the UTU if they wish to continue accruing seniority in train service while working as engineers. This, according to plaintiffs, leads to a form of compulsory dual unionism expressly prohibited by the RLA. Plaintiffs also argue that Side Letter 11 violates Section 2, Third and Fourth of the RLA because it interferes with the workers' rights to organize and bargain collectively through the representatives of their own choosing. Finally, plaintiffs alleged that Side Letter 11 violated Article 51 of the UTU constitution.

The district court concluded that Side Letter 11 was valid and granted judgment on the pleadings to Santa Fe and summary judgment for UTU. With respect to plaintiffs' argument under Section 2 Eleventh (c), the court noted that nothing on the face of Side Letter 11 required transferred train service employees working in engine service to maintain membership in the UTU as a condition of continued employment in the train service craft. *Dempsey v. Atchison, Topeka & Santa Fe Ry. Co.*, No. 92 C 5365 slip op. at 6 (N.D. Ill., December 30, 1992). Instead, the court found that Side Letter 11 merely required payment of dues to UTU should a transferred train service employee wish to continue accruing train service seniority while working in engine service. *Id.* at 7. Next, the court found that the side letter agreement did not violate Section 2, Fourth.[3] The court observed that the

---

[3] Although the plaintiffs in their complaint alleged violations of Section 2, Third, they advanced no argument before the district court in support of that claim. The district court considered this argument waived, *id.* at 4 n.1, and so do we. See e.g.

original purpose behind Section 2, Fourth was to prevent unorganized employees from being forced into joining so-called "company unions" under the control of the railroad. Because plaintiffs were not unorganized employees, the only way they could invoke the protections of Section 2, Fourth would be if they could demonstrate that by enacting Side Letter 11, Santa Fe and UTU had struck "a fundamental blow to union or employer activity and the collective bargaining process itself." *Id.* at 12 (quoting *Trans World Airlines v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426, 442 (1989)). Using this standard, the district court concluded that Side Letter 11's requirement of monthly dues to accrue additional seniority in the UTU was not a severe assault to the BLE and therefore did not rise to a violation of Section 2, Fourth. Having thus disposed of plaintiffs' federal claims, the district court concluded that it did not have supplemental jurisdiction over plaintiffs' state law claim regarding the violation of UTU's constitution. This timely appeal followed.

II. Analysis

A. *Standard of Review*

In its order, the district court stated that it had before it, and consequently granted, a motion by Santa Fe for judgment on the pleadings pursuant to Fed. R. Civ. P.

Gray v. Lacke, 885 F.2d 339, 409 (7th Cir. 1986), *cert. denied*, 494 U.S. 1029 (1990) (failure to raise issue in the district court results in a waiver on appeal); *accord Amplicon Leasing v. Coachmen Industries, Inc.*, 910 F.2d 468, 471 (7th Cir. 1991).

12(c) and a motion by UTU for summary judgment pursuant to Fed. R. Civ. P. 56(c). However, after examining Santa Fe's "Memorandum In Opposition To Plaintiffs' Motion For Preliminary Injunction And In Support Of Defendant Santa Fe's Motion For Judgment On The Pleadings," R. 24, it is clear to us that Santa Fe's motion was really one for summary judgment. For example, in the section of Santa Fe's memorandum entitled "Brief Statement of Facts," Santa Fe states that as support for its factual allegation, it was relying not only upon its complaint but also upon the affidavit of BLE's General Chairman, Charles A. McDaniel. *Id.* at 4. True to its word, throughout its memorandum Santa Fe frequently cites to the McDaniel affidavit; moreover, Santa Fe also directed the district court to an affidavit of UTU's General Chairman, J.G. Bailey, which had been filed in support of UTU's motion for summary judgment. Because Santa Fe presented to the district court matters which were outside the pleadings, Santa Fe's motion for judgment on the pleadings converted into a motion for summary judgment. *See* Fed. R. Civ. P. 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment"); *see also English v. Cowell*, 10 F.3d 434, 437 (7th Cir. 1993) (in ruling on a dismissal for failure to state a claim, a district court may consider matters outside the pleadings if the motion is treated as a motion for summary judgment). This is not merely an academic exercise because later in our opinion we refer to certain affidavits, and given that we are treating UTU and Santa Fe the same for purposes of this appeal, any reference to affidavits, while

usual and customary in the course of reviewing summary judgments under Rule 56, would be incompatible with a review of a judgment on the pleadings entered under Rule 12(c). Therefore, the district court should have denominated both of its orders as ones for summary judgment and this is how we shall treat them.

This being said, we review summary judgment orders *de novo*, viewing the record and all reasonable inferences drawn from it in the light most favorable to the non-movant. *See Anderson v. Stauffer Chemical Co.*, 965 F.2d 397, 400 (7th Cir. 1992). A district court's grant of summary judgment is appropriate – in fact, is mandated – where there are no disputed issues of material fact and the movant must prevail as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In other words, the record must reveal that "no reasonable jury could find for the non-moving party." *Anderson*, 965 F.2d at 400 (citing *Karazanos v. Navistar Int'l Transp. Corp.*, 948 F.2d 332, 335 (7th Cir. 1991)).

B. *Section 2, Eleventh (c) and Dual Unionism*

Plaintiffs vigorously renew their contention that Side Letter 11 in word and in deed constitutes a form of compulsory dual unionism in violation of Section 2, Eleventh (c) of the RLA. The legislative background leading up to the enactment of Section 2, Eleventh (c) was succinctly set forth by Mr. Justice Harlan in *Pennsylvania Ry.*

Co. v. Rychlik, 352 U.S. 480 (1956).[4] When enacted in 1926, the RLA did not provide for union shop agreements. As stated earlier, a union shop agreement is one where, as part of the collective bargaining agreement between the employer and the union, newly-hired employees are required, as a condition of continued employment, to become a member of the authorized bargaining representative of their craft within a certain set period of time following their employment. In fact, in 1934, Congress, in an effort to combat company dominated unions, which were then prevalent on railroads, made union shop provisions illegal. *See Rychlik*, 352 U.S. at 489 n. 18. It was not until 1951 that Congress decided unions should be allowed to benefit from union shop agreements and, as a result, added Section 2, Eleventh (a) to the RLA. *Id.* at 489. That provision, in relevant part, provides:

> [A]ny carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted –
>
> (a) to make agreements, requiring, *as a condition of continued employment*, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class. . . .

---

[4] While this background has little relevance when examining the plain meaning of the present statute, it does give an historic perspective to events and circumstances which led up to the current legislation.

45 U.S.C. §152, Eleventh (a) (emphasis added). Congress enacted Section 2, Eleventh (a) to eliminate the free rider problem, specifically, that nonunion employees were enjoying the benefits obtained by the union's efforts in collective bargaining without having to pay any of the costs. *See Rychlik*, 352 U.S. at 489.

In agreeing to authorize the union shop Congress was concerned what impact this would have vis-a-vis the intercraft mobility typically associated with the railroad industry. Labor in the railroad industry is organized largely by craft rather than industry. For example, the train service employees – engineers, firemen, trainmen, switchmen, and brakemen – are organized separately for collective bargaining purposes from the engine service employees. And, as in our case, these crafts are typically represented by different unions. Despite this organization along craft lines, seasonal shifts or a change in the railroad's needs for certain workers in one craft result in a certain amount of ebb and flow of individual employees between the different crafts. Thus, as in our case, a trainman could be promoted to serve temporarily as an engineer; when there is not enough work for engineers, the transferred trainman, being low man on the totem pole, would be returned to train service. But this shuttling back and forth between crafts can pose a dilemma for the transferred employee: upon being transferred to another craft he would be required by the craft's union shop agreement to belong to the union representing the new craft to which he has been promoted. He will then have to choose between becoming a member of two unions, which could be costly, or of quitting his old union upon transfer into the new craft, which could result in the loss

of benefits and seniority. *See generally Rychlik*, 352 U.S. at 490 (discussing historical background leading up to adoption and amendment of union shop provision in Section 2, Eleventh).

In order to eliminate this dilemma, Congress, in addition to enacting the union shop in Section 2, Eleventh (a), also offered an amendment which became Section 2, Eleventh (c). That provision provides in relevant part:

> The requirement of membership in a labor organization *in an agreement made pursuant to subparagraph (a) of this paragraph* shall be satisfied, as to both a present or future employee engaged in engine, train, yard, or hostling service . . . if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft of class in any of said services.
>
> . . .

45 U.S.C. §152 Eleventh (c) (emphasis added). Therefore, Section 2, Eleventh (c) eliminated the possibility that the adoption of the union shop would lead to dual unionism, *i.e.*, being forced to join more than one union, or the necessity of changing from one union to another when an employee temporarily changed crafts. As explained by the Supreme Court:

> the sole aim of [Section 2, Eleventh(c)] was to protect employees from the requirement of dual unionism in an industry with high job mobility, and thus to confer on qualified unions the right to assure members employment security, even if a member should be working temporarily in a

> craft for which another union is the bargaining representative.

Rychlik, 352 U.S. at 489.

Plaintiffs argue that Side Letter 11 on its face constitutes an illegal addition to the 1966 union shop provision between Santa Fe and UTU. Plaintiffs do not contend that the 1966 union shop provision between Santa Fe and UTU violates the RLA. Nor could they: the 1966 union shop provision tracks identical language found in Section 2, Eleventh (c) which provides that membership in a national union, such as UTU or BLE, satisfies the union shop requirements. What plaintiffs are apparently trying to contend is that by executing Side Letter 11, the otherwise valid union shop agreement has become invalid under Section 2, Eleventh (c). Now, according to plaintiffs, it is no longer enough to simply belong to UTU or BLE to satisfy the union shop requirement; rather, transferred trainmen who do not pay dues to UTU while working in engine service (where presumably they would be dues-paying members of the BLE) will lose seniority in the train service craft and, eventually, their jobs. This eliminates any incentive to join or to remain in the BLE. Thus, Side Letter 11 in effect leaves transferred train service employees no reasonable choice but to become members of the UTU (and not the BLE) in order to satisfy the union shop. As plaintiffs see it, this flies in the face of Section 2, Eleventh (c).[5]

---

[5] Plaintiffs also object to the district court's characterization of these payments as monthly dues as compared to membership in UTU. This distinction is irrelevant in light of the critical issue before this court, which is whether or not these payments were a condition of continued employment.

But by jumping into how Side Letter 11 violates Section 2, Eleventh (c), BLE, in the words of the district court, has "put the proverbial cart before the horse." As stated above, Section 2, Eleventh (c) is only a limitation on Section 2, Eleventh (a)'s general authorization of the union shop under the RLA. In other words, the prohibitions against dual unionism contained in Section 2, Eleventh (c) only kick in when the agreement at hand purports to be union shop agreement made pursuant to Section 2, Eleventh (a). As noted by the district court, however, there is nothing on the face of Side Letter 11 which establishes any conditions of continued employment in the train service craft upon the making of monthly payments to the UTU. Nor, for that matter, does Side Letter 11 require the payment of dues to UTU in order to preserve already-acquired seniority in train service. *Cf. N.L.R.B. v. Manitowoc Engineering Co.*, 909 F.2d 963, 969-71 (7th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991) (requiring transferred or promoted employees to maintain union membership in order to retain seniority *already earned* constitutes impermissible discrimination under § 8(a)(3) of the NLRA). Instead, Side Letter 11 merely requires that a transferred train service employee must pay dues to UTU if he wants to accrue *additional* train service seniority while working outside train service. If he chooses not to make the payments, and chooses instead to make payments to BLE, he will not accumulate *additional* train service seniority while working outside that craft, but he still satisfies the Santa Fe-UTU union shop requirements, and as such, cannot be terminated for failing to comply with its terms. Because Side Letter 11 does not create any conditions of continued employment

in train service, it is not a union shop agreement pursuant to Section 2, Eleventh (a) at all, much less an illegal one under Section 2, Eleventh (c). Therefore, we agree with the district court that, as a matter of law, this Side Letter agreement entered into between Santa Fe and UTU is wholly outside the realm of Section 2, Eleventh (c).

Notwithstanding the above, plaintiffs assert that the "clear and unequivocal" language of Section 2, Eleventh (c) indeed does prohibit Santa Fe and UTU from entering into any agreement such as Side Letter 11. In support, they point to the last proviso of Section 2, Eleventh (c), which states:

> *Provided, further,* that nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

45 U.S.C. § 152 Eleventh (c) (emphasis in original). Plaintiffs maintain that this language absolutely guarantees transferred train service employees the right to change their union membership to BLE without being out of compliance with the Santa Fe-UTU union shop requirements. Br. at 38. But despite these efforts, plaintiffs still have not shown how anything on the face of Side Letter 11 comes close to resembling a union shop agreement. Section 2, Eleventh (c) cannot be conveniently dissected into a few seemingly favorable clauses. From its very first sentence ("The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph"), this section makes it unmistakably clear that it is only a limitation upon those

agreements which require membership in a union as a condition of continued employment – union shop agreements. Because plaintiffs have failed to make any cogent argument as to how Side Letter 11 forces transferred employees to join multiple unions *as a condition of continued employment*, Section 2, Eleventh (c) is simply inapplicable.[6]

---

[6] We further agree with the district court that the authority plaintiffs rely upon in making their point, to wit, *Felter v. Southern Pacific Co.*, 359 U.S. 826 (1959), *Birkholz v. Dirks*, 391 F.2d 289 (7th Cir. 1968), *vacated as moot*, 395 U.S. 210 (1969), and *O'Connell v. Erie Lackawanna R.R.*, 391 F.2d 156 (2nd Cir. 1968), *vacated as moot*, 393 U.S. 210 (1969), is inapposite. For example, in *Felter*, the Supreme Court held that the union and the railroad violated Section 2, Eleventh *(b)* – a provision allowing the railroad unions to make "check off" agreements with the carrier for the deduction from a member employee's wages of periodic dues, initiation fees, and assessments, *see* 45 U.S.C. § 152 Eleventh (b) – by preventing employees from changing union membership unless they did so on the official form provided by the union. *Felter*, 359 U.S. at 337-8. Thus, this case has no bearing whatsoever on the applicability of Section 2, Eleventh (c). In *Birkholz*, this circuit did discuss the applicability of Section 2, Eleventh (c) when it held that the union and the railroad had entered into an invalid union shop agreement that only permitted membership in a labor union national in scope and *having contracts with the same railroad*. *See Birkholz*, 391 F.2d at 291-92. But unlike Side Letter 11, the agreement at issue in *Birkholz* clearly was a union shop agreement, *i.e.*, one creating conditions of continued employment, and therefore was within the scope of Section 2, Eleventh (c). Similarly, in *O'Connell*, the Second Circuit held that the union shop agreement between the railroad and the sole union representing all of its employees violated Section 2, Eleventh (c) because it required all employees to become members of that union, notwithstanding their membership in another operating union that was national in scope. *O'Connell*, 391 F.2d at 162-3. Like *Birkholz*, *O'Connell* dealt with an agreement which

Having thus failed in their facial challenge to Side Letter 11, plaintiffs, relying largely upon an affidavit sworn to by BLE's General Chairman, Charles McDaniel, Jr., make the argument that the dues requirement in Side Letter 11 results in a *de facto* condition of employment. To better understand this argument it is necessary to understand how a trainman becomes and remains an engineer. In 1985, UTU and Santa Fe entered into a national agreement which made the train service craft the main source of supply for new engineers. When a train service worker is promoted to engineer, he becomes a junior engineer. When there is not enough work for engineers, those junior in seniority will return to train service. If there is also a shortage of work in train service, and if the worker does not have enough train service seniority to survive layoffs in that craft, then he will be furloughed until there is work available in either craft. And if furloughed for a year, the engineer will lose all of his train service seniority. *Id.*, at 3. Plaintiffs argue that, under present business conditions, employees have no choice but to pay dues to UTU if they do not want to find themselves unemployed because they dropped in seniority in train service (in relation to others who did not transfer and continued accruing seniority) while working outside that craft.

In making this argument, BLE is essentially asking this court for a determination that Section 2, Eleventh (c) somehow guarantees transferred employees the right to continue accruing seniority. Yet it is well-established that,

---

was unmistakably a union shop provision; and again, because Side Letter 11 is not, this case is inapposite.

barring some legislative pronouncement to the contrary, seniority rights arise out of the collective bargaining agreement entered into between the employer and the union. *See Aeronautical Lodge v. Campbell*, 377 U.S. 521, 526 (1948); *Trailmobile Co. v. Whirls*, 831 U.S. 40, 53 n.23 (1946); *see also Elder v. New York Central Ry. Co.*, 152 F.2d 361, 364 (seniority rights arise out of collective bargaining agreement between employees and the employer); Robert A. Gorman, Labor Law 540 (1976) (labor contracts contain, among other things, provisions for employee security). Of course any entitlements established by the collective bargaining agreement, including seniority rights, are generally subject to modification or expiration. *See Senn v. United Dominion Indust. Inc.*, 951 F.2d 806, 816 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2992 (1993) (citing *Merck v. Jewell Companies, Inc.*, 848 F.2d 761, 763 (7th Cir. 1988), *cert. denied*, 488 U.S. 956 (1988)); *see also McMullans v. Kansas, Oklahoma and Gulf Ry. Co.*, 229 F.2d 50, 53 (10th Cir.), *cert. denied*, 351 U.S. 918 (1956) ("those who acquired seniority rights under a contract are bound by the possibility that the contract may be changed, and the rights thereunder revised or abrogated"). In short, employees, such as those employed under the Santa Fe-UTU collective bargaining agreement, "have no vested right in the seniority created by [that] contract and that RLA does not undertake to guarantee them a job for life." *McMullans*, 229 F.2d at 53. There is nothing in the language of Section 2, Eleventh (c) which purports to guarantee a transferred employee the right to continue accruing seniority in a craft other than the one in which he is currently employed. What the RLA *does* guarantee, at least with respect to Section 2, Eleventh (c), is that

transferred employees will not be forced to join multiple unions. And as we have previously shown, the Santa Fe-UTU union shop is satisfied if employees are members of either BLE or UTU. There is no doubt that Side Letter 11 has provided an additional benefit to those transferred train service employees who choose to pay dues to the UTU; the continued accrual of seniority. It may very well be that this will tempt transferred trainmen who currently are members of BLE to satisfy their Santa Fe-UTU union shop obligations by paying their monthly dues to UTU. This is not the same, however, as being forced to do so as a condition of continued employment. Therefore, the district court correctly concluded that, as a matter of law, nothing in the language or even the purposes behind Section 2, Eleventh (c) indicates that Side Letter 11 is prohibited under the RLA.

BLE finally argues that upholding Side Letter 11 would upset the cost-sharing scheme that is evident in Section 2, Eleventh (c). Under Section 2, Eleventh (c) alternate membership in a national union is limited to those unions which qualify under 45 U.S.C. § 153 First of the RLA as electors of the union representatives on the National Railroad Adjustment Board (NRAB), the agency designed to settle disputes arising under collective bargaining agreements. *See Rychlik*, 352 U.S. at 485. This requirement ensures that membership in satisfaction of a union shop will be confined to those unions which share the costs of administering the NRAB, and which join together in other respects in the negotiating and policing of collective bargaining agreements under the dispute mechanisms of the RLA. BLE does not contend, nor can it, that UTU does not qualify under Section 3, First of the

Act. In fact, in its brief, BLE unequivocally states that "membership in either BLE or UTU is regarded as adequate support for collective bargaining activities." Br. at 43. If this is the case, then BLE's contention is contradictory. BLE, however, tips its hand at what it's really arguing for, when, in the next sentence of its brief, it asserts that "Side Letter 11 destroys this scheme and was entered into with the intent of upsetting the financial support for BLE's collective bargaining activities." *Id.* Translation: Side Letter 11 deprives us of our "fair share" of contributions which go towards the support of the NRAB. There is no provision under the RLA which guarantees qualifying unions that they will receive a certain set amount of dues to off-set their obligations to the NRAB. The RLA does not attempt to provide financial security to labor organizations through some sort of redistribution of membership dues. Therefore, this additional argument against Side Letter 11 is groundless.

C. *Section 2, Fourth*

Plaintiffs argue that even if Side Letter 11 is not an illegal union shop agreement in violation of Section 2, Eleventh (c), it nevertheless constitutes unlawful interference and coercion in an effort to induce them to place their membership with BLE [sic] instead of UTU [sic]. As support for this argument, plaintiffs point to Section 2, Fourth of the RLA which, in pertinent part, provides:

> No carrier, its officers or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way

> with the organization of its employees, . . . *or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization*. . . .

45 U.S.C. § 152 Fourth (Section 2, Fourth) (emphasis added). In their brief, however, plaintiffs step away from the statute at hand and instead rely primarily on case law interpreting Section 8(a)(3) of the National Labor Relations Act, using the language of that provision as a shroud to cover the shortcomings of Section 2, Fourth. While the Supreme Court has observed that the NLRA may provide helpful analogies for interpreting the RLA, *see Trans World*, 489 U.S. at 432, the Court has also emphasized that "the NLRA cannot be imported wholesale into the railway labor area." *Id.* at 439. This is especially true where, as in our case, we are not faced with such a paucity of precedent under the RLA that we must leapfrog over that provision and proceed immediately into the NLRA. Quite to the contrary, we need not resort to the NLRA at all, for applicable case law under the RLA is sufficient for our determination that Side Letter 11 is not barred by Section 2, Fourth.

Section 2, Fourth was enacted as part of the 1934 amendments to the RLA. From the start, the Supreme Court has viewed the 1934 amendments "as addressing primarily the *precertification* rights and freedoms of unorganized employees" so that they could "organize and [choose] their [own] representative without the coercive interference and pressure of a company union." *Trans World*, 489 U.S. at 440 (citations omitted) (emphasis added). This precertification emphasis makes sense in light of the framework of the RLA. Congress enacted the

RLA in 1926 in order to prevent, among other things, disruptions in interstate commerce caused by labor disputes in the railway industry, 45 U.S.C. § 151a. The RLA achieves this purpose by setting forth an exhaustive and detailed framework for resolving disputes between railroads and their employees involving union representation or contract formation, known as "major disputes," or those involving grievances and the interpretation of collective bargaining agreements, known as "minor disputes." *See Consolidated Rail v. Ry. Labor Executive Ass'n*, 491 U.S. 299, 302 (1989). Without the initial assurance provided for in the 1934 amendments that "the employees' putative representative is not subject to control by the employer," *Trans World*, 489 U.S. at 441, the effectiveness of the RLA's private dispute resolution procedures would be undermined, with the result that the parties, instead of remedying their differences through the RLA's administrative means, would consistently be "enlist[ing] the courts to further [their] own partisan ends." *Id.*

As noted by the district court, however, plaintiffs are not unorganized workers but members of one of the two labor organizations which already serve as the exclusive bargaining unit representatives for a particular craft. Does this render Section 2, Fourth automatically inapplicable to the case at hand? Not necessarily. In situations such as ours, known as "post-certification" controversies, Section 2, Fourth has been interpreted as providing protection where the plaintiff can show that the employer's actions "strike a fundamental blow to union or employer activity and the collective bargaining process itself." *Trans World*, 489 U.S. at 442. Typically, these post-certification controversies take place

during a period in which deadlocked parties resort to what is known as "self-help." This occurs when the employer and the union have exhausted any attempts to resolve their major disputes through mediation and arbitration. At that point they resort to whatever various forms of peaceful economic power they can muster to continue the carrier's operations, and at the same time, cause one of the parties to relent and reach a settlement. With respect to this final stage of a labor dispute, "the Act is wholly inexplicit as to the scope of allowable self-help" available to the parties once the RLA's major dispute resolution procedures have been exhausted. *Trans World*, 489 U.S. at 442. The only basis for judicial intervention pursuant to Section 2, Fourth at this stage is when either side to the dispute has employed self-help measures that are "inherently destructive of union or employer activity." *Id.*; *see also Rennesisen v. American Airlines, Inc.*, 990 F.2d 918, 922 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 303 (1993).[7]

In support of their motions for summary judgment below, both Santa Fe and UTU relied on the affidavit of UTU's General Chairman, Mr. J.G. Bailey, as direct evidence of the absence of anti-union animus with respect to Side Letter 11. In his affidavit, Mr. Bailey attested:

> 3. There was no purpose or intent in making that agreement to undermine Brotherhood of Locomotive Engineers as bargaining representative for the engineer craft of employees on the

---

[7] As we recently stated in *Renneisen:* "TWA offered this phrase to help courts analyze the merits of self-help actions, and not to determine if a court has jurisdiction in the first instance." *Renneisen*, 990 F.2d at 922-23.

> Santa Fe. Nor did the Santa Fe have any such intent or purpose in making the agreement.
>
> 4. The purpose of the July 6, 1992 agreement was to have employees who hold train service seniority, but go to work outside the craft in engine service, contribute financial support to the labor organization that enforces the train service craft seniority agreements and protects that absent employee's seniority and his right to come back to train service in the event of layoff in engine service. This is a valuable right and UTU protects it while that employee is transferred.

At this point, it was up to plaintiffs, as the non-moving party, to put forward some evidence sufficient to establish the existence of a genuine dispute regarding the purposes behind Side Letter 11 – an element on which plaintiffs bore the burden of proof at trial. *See Celotex*, 477 U.S. at 323; Fed. R. Civ. P. 56(e). But from our examination of plaintiffs' lengthy document entitled "Memorandum in Opposition to Defendant UTU's Motion for Summary Judgment and Defendant Santa Fe's Motion for Judgment on the Pleadings," we see no mention of any evidence to rebut Santa Fe's and UTU's showing of no anti-union animus; in fact, we see no mention of this element at all. While inundating the district court with endless analogies to the NLRA, the plaintiffs chose not to address the requirements for a valid claim under Section 2, Fourth of the RLA.

Nevertheless, we have examined the entire record before the district court and have come up with what we consider to be the only evidence in favor of the plaintiffs

which has any relevance towards controverting the showing of no anti-union animus. Plaintiffs submitted an affidavit of BLE's General Chairman Charles A. McDaniel, in which he asserts:

> Contrary to the statement contained in paragraph 3 of UTU General Chairman J.C. Bailey's affidavit, Side Letter No. 11 does undermine that Brotherhood of Locomotive Engineers as bargaining representative for the engineer craft of employees on Santa Fe. How he would know that Santa Fe did not have any such intent or purpose, as he asserts in the same paragraph, is beyond me.

On their face, however, these statements do no more than offer conclusory statements unsupported by one shred of specific facts. As such, these conclusory statements were insufficient to create a genuine issue of triable fact. *See First Commodity Traders v. Heinold Commodities*, 766 F.2d 1007, 1011 (7th Cir. 1985); *Hall v. Printing & Graphic Arts Union*, 696 F.2d 494, 500 (7th Cir. 1982); *accord* 10A Wright, Miller & Kane, *Federal Practice and Procedure*, § 2738 at 486-88 (1983). Put simply, these comments by McDaniel were non-responsive to evidence of no animus put forward by UTU and Santa Fe and therefore do not create a genuine issue of triable fact for purposes of summary judgment.

Moreover, in light of the collective bargaining agreements between Santa Fe and UTU we see no anti-union animus reflected in Side Letter 11. As the reader recalls, under the original 1966 Santa Fe-UTU collective agreement, transferred trainmen were able to accrue additional seniority without having to pay monthly dues to UTU.

Things changed, however, when, in 1992, UTU agreed to Santa Fe's crew consist reduction, which resulted in the loss of employees from UTU's membership roster. It was obvious that with this shrinking membership base, UTU could not afford to let transferred employees accrue additional seniority and at the same time not pay dues. Thus, the purpose behind Side Letter 11 was to ensure that those who continue to accumulate additional train service seniority while working outside that craft should contribute to support administration of the train service labor agreements and the UTU which had the responsibility for protecting train service seniority and seniority agreements. We see nothing on the face of Side Letter 11 which indicates that the parties were focusing on BLE, much less that they were somehow conspiring to undermine its bargaining status.

Putting this aside, we fail to see how Side Letter 11 is the draconian measure that plaintiffs make it out to be.[8] Side Letter 11 neither terminates nor penalizes anyone for joining or failing to join a union. We agree with the district court that this side letter agreement entered into between Santa Fe and the UTU constituted a less severe assault upon the BLE in comparison to other measures

---

[8] As an aside, it would seem that the phrase "anti-union animus" refers to an employer's general hostility towards union activity. Here, Santa Fe did not demonstrate anti-union hostility; in fact, it dealt favorably with a union, UTU, in executing Side Letter 11. BLE has not presented us with, nor have we found, a similar case in which an employer, whose employees are represented by more than one union, strikes a deal which "prefers" or "favors" one union over another. But, inasmuch as this matter is not dispositive to our analysis, we need not pursue it further.

upheld by the courts, measures which were unilaterally adopted by employers, and which directly targeted specific unions. *See, e.g., Trans World*, 489 U.S. at 443 (airline's policy of retaining junior crossover strikers over full-term strikers held lawful under Section 2, Fourth); *Renneisen*, 990 F.2d at 924-25 (agreement entered into between airline and pilots' union, which relinquished wages and benefits for future pilots and preserved wages and benefits for current pilots, held lawful under Section 2, Fourth); *Nat'l R.R. Passenger Corp. v. Int'l Ass'n of Machinists*, 915 F.2d 43, 46-7 (1st Cir. 1990) (disciplinary investigation of three union representatives held lawful under Section 2, Fourth); *Int'l Ass'n of Machinists v. Alaska Airlines, Inc.*, 813 F.2d 1038, 1039 (9th Cir. 1987), *cert. denied*, 484 U.S. 926 (1987) (airline's establishment of recall plan that gave priority for new jobs to replacements and crossover strikers over full-term strikers held lawful under Section 2, Fourth). In sum, we conclude that Side Letter 11 was nothing more than a lawful exercise of peaceful economic power that Santa Fe and UTU "were free to deploy once the parties had exhausted the private dispute resolution mechanisms of the RLA." *Trans World*, 489 U.S. at 443. We therefore agree with the district court that Side Letter 11, as a matter of law, did not constitute an attack on the BLE or the collective bargaining process as prohibited by Section 2, Fourth.

III. Conclusion

The side letter agreement executed between Santa Fe and UTU was a lawful means of self-help the parties were free to employ once they had exhausted the dispute resolution mechanisms of the RLA. Because it does not make

the payment of monthly dues to UTU a condition of continued employment, it by definition is not a union shop agreement, and therefore is wholly outside the scope of Section 2, Eleventh (c). Neither was it motivated by anti-union animus directed at BLE, nor an attempt to interfere with the collective bargaining process, which places it outside the reach of Section 2, Fourth. Therefore, Side Letter 11 does not violate the RLA. Accordingly, the orders of the district court are

AFFIRMED.

REYNOLDS, *District Judge*, concurring. I agree with all aspects of the majority decision except its conclusion "that Side Letter 11, as a matter law, did not constitute an attack on the BLE" within the meaning of the anti-influence provision of RLA Section 2, Fourth. Because the record contains so little evidence on the purpose or probable effect of the side letter, my view is that this claim should have been dismissed solely on the ground that plaintiffs failed to adduce specific facts in support of it. *See* Fed. R. Civ. P. 56(e).

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago, Illinois 60604
April 1, 1994

Hon. Joel M. Flaum, *Circuit Judge*

Hon. Daniel A. Manion, *Circuit Judge*

Hon. John W. Reynolds, *District Judge**

DENNIS T. DEMPSEY, RONALD E. SHAVER, RAYMOND E. YOUNG, et al.,
Plaintiffs-Appellants,

No. 93-1085 *v.*

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, UNITED TRANSPORT UNION, and J.G. BAILEY, as General Chairman of United Transportation Union,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

92 C 5365

Harry D. Leinenweber, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Plaintiffs-Appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

---

* Hon. John W. Reynolds, District Judge for the Eastern District of Wisconsin, is sitting by designation.

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DENNIS T. DEMPSEY, RONALD E. SHAVER, RAYMOND E. YOUNG, A.W. FISH, G.W. GATTEN, RUSSELL N. ROGERS, R.J. WEBER, J.P. VALDEZ, and BROTHERHOOD OF LOCOMOTIVE ENGINEERS, Plaintiffs, v. THE ATCHISON, TOPEKA and SANTA FE RAILWAY COMPANY, UNITED TRANSPORTATION UNION, and J.G. BAILEY as General Chairman of United Transportation Company, Defendants.	CASE NO. 92 C 5365 JUDGE LEINENWEBER (Filed Dec. 30, 1992)

MEMORANDUM OPINION AND ORDER

Plaintiffs, the Brotherhood of Locomotive Engineers ("BLE"), and eight engineers employed by defendant, Atchison, Topeka and Santa Fe Railway Company ("Santa Fe"), have filed this suit to enjoin the enforcement of a side letter agreement to a collective bargaining contract between Santa Fe and defendant, United Transportation Union ("UTU"). Defendants have moved for summary judgment. For the following reasons, defendants' motions for summary judgment are granted.

BACKGROUND

Santa Fe is an interstate rail carrier within the meaning of Section 1 of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* Defendant, UTU, is the exclusive bargaining representative for the class of Santa Fe employees commonly referred to as train service employees. Included in this category, or "craft," of train service employees are Santa Fe's conductors, brakemen and switchmen. Plaintiff, BLE, is the exclusive bargaining representative for Santa Fe's locomotive engineers, also known as engine service employees.

Under an agreement between UTU and Santa Fe, dated September 1, 1966, train service employees first obtained seniority through date of hire or first service in the craft and then maintained seniority standing thereafter by the terms of the agreement. Under the agreement, an employee who left the train service crafts continued to accumulate train service seniority.

In 1988, Santa Fe, BLE and UTU were all parties to a round of negotiations between the nation's railroads and railway labor organizations. The parties were unable to reach an agreement during those negotiations. To break the deadlock, President George Bush appointed Presidential Emergency Board No. 219 (the "Board"). Among other things, the Board recommended that UTU negotiate agreements with the individual railroads reducing the number of train service employees in a crew. These recommendations were imposed on the parties by Congress through Public Law 102-29.

In accordance with the legislated agreement, UTU and Santa Fe adopted a crew consist agreement whereby

UTU agreed to the elimination of train service positions and the separation of train service employees through buy outs. UTU and Santa Fe also executed a side letter agreement to the crew consist agreement. This side letter agreement, known as Side Letter No. 11, contained the following requirements on payment of dues to the UTU by a train service employee who transfers to engine service:

> Full dues to the United Transportation Union will be required of such employees in order for them to continue accumulating general [sic] service seniority.
>
> * * *
>
> Ground service employees failing to pay full monthly dues to the UTU after transferring to engine service, will not thereafter accumulate any additional conductor, brakemen or yardmen seniority, and thus will fall on any relevant conductors', trainmen's or yardmen's roster below persons who do continue to accumulate such seniority.

Four of the individual plaintiffs in this action are members of the UTU, currently working in engine service, who wish to join BLE. The remaining four individual plaintiffs are members of BLE who are also working in engine service. Under Side Letter No. 11, all eight individual plaintiffs will cease accruing seniority in train service unless they pay dues to UTU while working in engine service. They, along with BLE, have brought this action to enjoin the implementation of the side letter agreement.

ANALYSIS

As a preliminary matter, the court will first turn to UTU's claim that the court is without jurisdiction to entertain the instant suit. As both UTU and plaintiffs recognize, the court has jurisdiction to hear a challenge to the validity of Side Letter No. 11. UTU engages in a bit of semantical gymnastics in an effort to explain how this challenge to the validity of Side Letter No. 11 is a question of contract interpretation rather than contract validity. Essentially, UTU argues that because the side letter agreement makes no mention of discharge for failure to pay dues, the question of whether payment is made a condition of employment is one of interpretation, not validity.

While this is an interesting point, it is clearly wrong. The loss of employment security which a BLE member might incur due to a reduction in seniority standing has absolutely nothing to do with the intent of the parties, as UTU claims, but with the relative seniority of BLE and UTU members at a given moment in time. Furthermore, the court does not hear UTU to argue that plaintiffs' interpretation of the side letter agreement is wrong. In fact, all the parties seem to understand that the likely result of Side Letter No. 11 is a loss of seniority standing for BLE members who are transferred back to train service. Rather, UTU argues that the agreement, which may create that result, is not prohibited by the RLA. This is a classic question of contract validity, not interpretation. *See Brotherhood of RR Trainmen v. Howard*, 343 U.S. 768, 774, 72 S.Ct. 1022 (1952).

Moving to the merits, plaintiffs contend that Side Letter No. 11 violates Sections 2 Fourth and 2 Eleventh (c) of the RLA and Article 51 of the UTU Constitution.[1] The court will address each argument in turn.

1. Section 2 Eleventh (c)

First, plaintiffs argue that Side Letter No. 11 violates Section 2 Eleventh (c) of the RLA.[2] Section 2 Eleventh was

---

[1] While plaintiffs originally alleged violations of RLA Sections 2 Third and Fifth, they advanced no argument as to these claims. As such, the court considers them waived.

[2] Section 2 Eleventh of the RLA, 45 U.S.C. §152 Eleventh, provides in part:

> [A]ny carrier or carriers as defined in this chapter and a labor organization or labor organizations . . . shall be permitted
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class. . . .
>
> * * *
>
> (c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee engaged in engine, train, yard or hostling service . . . if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services. . . .

added to the RLA in 1951 and gave railway unions the right to negotiate an union shop agreement with the carriers in the industry. While Section 2 Eleventh (a) permitted the execution of such union shop agreements, Section 2 Eleventh (c) was added to insure that the creation of the union shop did not lead to compulsory dual unionism. As the United States supreme Court has explained, the "sole aim of [Section 2 Eleventh (c)] was to protect employees from the requirement of dual unionism in an industry with high job mobility, and thus confer on qualified craft unions the right to assure members employment security, even if a member should be working temporarily in a craft for which another union is the bargaining representative." *Penn. RR Co. v. Rychlik*, 352 U.S. 480, 489, 77 S.Ct. 421 (1957).

As plaintiffs perceive it, requiring dues payments to UTU from persons working in engine service flies in the face of the RLA subsection which provides that membership in a national union, like BLE, satisfies the union membership requirement. According to plaintiffs, enforcement of Side Letter No. 11 will leave BLE with two choices: 1) watch its membership roll dwindle as BLE members in engine service begin joining UTU; or 2) negotiate a similar agreement with Santa Fe whereby UTU members would be required to pay dues to BLE while working in train service in order to assure the continued accrual of engine service seniority. Plaintiffs point out that the latter course would result in a compulsory dual union membership scheme, something which Section Eleventh (c) was designed to deter.

Plaintiffs have put the proverbial cart before the horse. Plaintiffs are correct when they point out that

under the terms of Section 2 Eleventh (c), membership in a nationally recognized union such as BLE satisfies the union membership requirement mentioned in Section 2 Eleventh (a). However, by its own terms, Section 2 Eleventh (a) only speaks to agreements which require union membership as a "condition of continued employment." On its face, Side Letter No. 11 does not condition employment in the train service craft upon the payment of dues to the UTU. Nor does it require payment of dues to the UTU as a quid pro quo for the preservation of seniority accrued during time served in train service. Instead, Side Letter No. 11 merely requires a Santa Fe employee working in engine service to pay dues to the UTU if he or she wishes to continue to accrue train service seniority while working outside of the train service craft. There is nothing in the language of Section 2 Eleventh which prohibits this arrangement.

Furthermore, the cases cited by plaintiffs in support of its argument are inapposite. In *Felter v. Southern Pacific Co.*, 359 U.S. 326, 336, 79 S.Ct. 847 (1959), the Supreme Court held that the trainmen's union and Southern Pacific could not prevent an employee from changing unions simply because he had not used the "official" checkoff form promulgated by the trainmen's union. The court's holding in *Felter* was specifically tailored to a checkoff situation under Section 2 Eleventh (b). In *Birkholz v. Dirks*, 391 F.2d 289 (7th Cir. 1968), *vacated*, 395 U.S. 210 (1969), the Seventh Circuit was presented with an agreement between the trainmen's union and the Milwaukee, St. Paul and Pacific Railroad [sic] (the "Milwaukee") that only recognized labor organizations

having "labor contracts" with the Milwaukee. The Seventh Circuit found that this agreement directly violated the provision of Section 2 Eleventh (c) requiring recognition of unions "national in scope." *See Birkholz*, 391 F.2d at 291-94. Neither of the above cases involved the definition of "condition of employment" in Section 2 Eleventh (a), and in both cases the agreements between the labor organization and carrier violated a specific and unambiguous provision of Section 2 Eleventh.

Plaintiffs do attempt to paint a picture of how the dues requirement in Side Letter No. 11 could make payments to UTU a *de facto* condition of employment. Plaintiffs have submitted an affidavit sworn to by Charles McDaniel, Jr. ("McDaniel"), BLE's General Chairman. McDaniel makes a number of allegations. First, McDaniel states that several of the individual plaintiffs are junior in seniority as engineers and must, therefore, work periodically as trainmen. When these individuals move back to train service they will allegedly suffer a loss of seniority standing if Side Letter No. 11 is implemented. McDaniel further alleges that a loss of seniority in one craft by reason of a rules violation or failure to comply with union shop provisions will result in a loss of seniority in the other crafts and termination by Santa Fe. McDaniel also points out that an employee with less seniority would be terminated if he refused to accept a trainman's assignment "as too onerous or hazardous for his age." McDaniel Affdvt. at 4. Finally, McDaniel makes mention of a provision of the 1985 mediation agreement between Santa Fe and UTU. Article XIII, §2 of that agreement provides that "on or after November 1, 1985, any person establishing seniority in engine service without first establishing seniority as trainman will establish a

seniority date as trainman on the date he or she establishes seniority in engine service." McDaniel concludes that as a result of Side Letter No. 11, an employee with less than eight years of trainman's seniority furloughed as an engineer could be unemployed as a trainman "under present business conditions."

Taking all the above allegations as true, the court still does not find that membership in UTU has been made a condition of employment. BLE membership satisfies the membership requirement in the UTU/Santa Fe union shop agreement,[3] and BLE members working as trainmen accrue trainmen seniority. UTU and Santa Fe have not made UTU membership a condition of employment, but have said that those employees paying dues to the UTU while away from train service gain an additional benefit: the continued accrual of trainmen seniority. Access to this benefit may tempt BLE employees to begin paying dues to UTU, or to join UTU outright. However, there is nothing in the language or legislative history of Section 2 Eleventh (c) which indicates that Side Letter No. 11 is prohibited under the RLA.

2. Section 2 Fourth

Next, plaintiffs contend that Side Letter No. 11 violates Section 2 Fourth of the RLA.[4] Plaintiffs advance that

---

[3] The union shop provision in the collective bargaining agreement between Santa Fe and UTU mimics Section 2 Eleventh (c).

[4] Section 2 Fourth provides in relevant part that

> No carrier, its officers or agents, shall deny or in any way question the right of its employees to join,

argument on two fronts. First, plaintiffs argue that Section 2 Fourth does not permit the execution of seniority agreements. Second, plaintiffs argue that even if the RLA does permit the execution of seniority agreements, the seniority agreement executed in this case violates Section 2 Fourth because Santa Fe has violated its obligation of total neutrality.

Plaintiffs primarily rely on two cases decided under Section 8(a)(3) National Labor Relations Act ("NLRA"), 29 U.S.C. §151 *et seq.* in advancing their Section 2 Fourth claim.[5] In *Radio Officers' Union v. NLRB*, 347 U.S. 17, 74

---

organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or assist in the collection of any such dues, fees, assessments, or other contributions. . . .

[5] Section 8(a)(3) provides that

(a) It shall be an unfair labor practice for an employer –

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

S.Ct. 323 (1953), the Supreme Court was asked to resolve a split among the circuits on the meaning of the terms "discrimination" and "membership" in Section 8(a)(3) of the NLRA. Among other things, the court held that an employer may not reduce an employee's seniority or refuse to hire that individual because the employee failed to follow union rules or failed to join the union. In *NLRB v. Manitowac Engineering Co.*, 909 F.2d 963, 969 (7th Cir. 1990), the Seventh Circuit held that Section 8(a)(3) of the NLRA prohibited an agreement between a company and union which required an employee transferred outside the bargaining unit to pay dues to the union if he or she desired to retain accrued seniority.

In the past courts have looked to the NLRA for assistance in interpreting the RLA. *See Brotherhood of RR Trainmen v. Jacksonville Term. Co.*, 394 U.S. 369, 383, 89 S.Ct. 1109 (1969). However, the two statutes regulate different industries with very different organizing histories, and analogies between the two acts thus "must be drawn circumspectly, with due regard to the differences between the two statutory schemes." *Id.*

In this case, the differences between the two statutes on the question of the encouragement or discouragement of union membership are significant. While Section 8(a)(3) has been construed as prohibiting an employer from inducing employees to remain or not remain members of a union, Section 2 Fourth has been viewed from its inception as "addressing primarily the precertification rights and freedoms of unorganized employees" against the coercion of company unionism. *TWA v. Independent Federation of Flight Attendants*, 489 U.S. 426, 109 S.Ct. 1225, 1234 (1989). In *TWA*, the Supreme Court went on to point

out that the 1934 amendments to the RLA, of which Section 2 Fourth is a part, were "directed particularly at control over the initial step in collective bargaining the determination of the employees' representatives." *TWA*, quoting *Switchmen's v. Nat'l Mediation Bd.*, 320 U.S. 297, 317, 64 S.Ct. 95 (1943).

Plaintiffs in this case are not unorganized workers, but members of one of two labor organizations which already serve as the exclusive bargaining unit representatives for a particular craft. In such a situation, Section 2 Fourth intervenes only where the actions of the employer "strike a fundamental blow to union or employer activity and the collective bargaining process itself." *TWA*, 109 S.Ct. at 1235.

In *TWA*, the court refused to apply Section 2 Fourth even though the airline's decision to retain strike crossovers with junior seniority was a significant assault on the power of the flight attendants' union. The assault on BLE is less severe in this case, and, as explained above, does not condition employment with Santa Fe upon membership in UTU. Accordingly, the court concludes that Side Letter No. 11 does not violate Section 2 Fourth of the RLA.

Article 51 of the UTU Constitution

Finally, plaintiffs allege that Side Letter No. 11 violates Article 51 of the UTU Constitution. This is essentially a state law action for breach of contract. Because the court has denied plaintiffs relief on their federal claims, the exercise of pendant jurisdiction in this case would be

an abuse of discretion. *See Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc.*, 781 F.2d 604, 611 (7th Cir. 1986).

CONCLUSION

Plaintiffs' motion for a preliminary injunction is denied. Defendants' motions for judgment on the pleading and summary judgment are granted.

IT IS SO ORDERED.

/s/ Harry D. Leinenweber
Harry D. Leinenweber, Judge
United States District Court

DATED: DEC 30 1992

United States District Court

NORTHERN DISTRICT OF ILLINOIS
Eastern Division

Dennis T. Dempsey, Ronald E. Shaver, Raymond E. Young, A.W. Fish, G.W. Gatten, Russell N. Rogers R.J. Weber, J.P. Valdez and Brotherhood of Locomotive Engineers

-v-

The Atchison, Topeka and Santa Fe Railway Company, United Transportation Union, and J.G. Bailey as General Chairman

JUDGMENT IN A CIVIL CASE

CASE NUMBER:
92 C 5365
Judge Leinenweber

[ ] Jury Verdict. This action came before the Court for a trail by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that motion for judgment on the pleadings and summary judgment is hereby entered in favor of the defendants' and against the plaintiffs'

December 30, 1992
Date

H. STUART CUNNINGHAM
Clerk

/s/ Wanda Barker
(By) Deputy Clerk

APPENDIX D

EXCERPTS FROM NLRA AND RLA

NATIONAL LABOR RELATIONS ACT
(49 Stat. 449, 29 U.S.C. §151 et seq.)

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment

membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

Section 8(b) It shall be an unfair labor practice for a labor organization or its agents –

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

THE RAILWAY LABOR ACT
(44 Stat. 577, 45 U.S.C. §151 et seq.)

Section 1a The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and

orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

* * *

Section 2 *Third* – Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth – Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any

way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * *

Eleventh – Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted –

(a) to make agreements, requiring, as a condition of continued employment, that

within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable

collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date

of the first agreement applicable to him: Provided, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said service.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

No. 93-2015

In The

Supreme Court of the United States

October Term, 1993

DENNIS T. DEMPSEY, RONALD E. SHAVER, RAYMOND E. YOUNG, A. W. FISH, G. W. GATTEN, RUSSELL N. ROGERS, R. J. WEBER, J. P. VALDEZ and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Petitioners,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, UNITED TRANSPORTATION UNION, and J. G. BAILEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

NORTON N. NEWBORN
(Counsel of Record)
NORTON N. NEWBORN CO., L.P.A.
24100 Chagrin Blvd.
Suite 330
Cleveland, Ohio 44122
(216) 464-1400

PATRICK J. HARRINGTON
HARRINGTON, THOMPSON, ACKER, & HARRINGTON, LTD.
Suite 2000
310 S. Michigan Ave.
Chicago, Illinois 60604

Counsel for Respondents United Transportation Union and J. G. Bailey

J. STEPHEN POOR
(Counsel of Record)
DAVID J. ROWLAND
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
Suite 4200
55 East Monroe St.
Chicago, Illinois 60603
(312) 346-8000

Counsel for Respondent The Atchison, Topeka and Santa Fe Railway Company

July 18, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether Section 2 Fourth or Eleventh (c) of the Railway Labor Act, 45 U.S.C. Section 152 Fourth and Eleventh (c) make unlawful an agreement between a carrier, The Atchison, Topeka and Santa Fe Railway Company and its train service employees' collective bargaining representative, United Transportation Union, whereby train service employees are required to pay dues to United Transportation Union in order to continue to accumulate train service seniority when working outside the train service crafts in engine service.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT AND AUTHORITIES FOR DENIAL OF THE WRIT 5

I. PETITIONERS HAVE PRESENTED NO CREDIBLE REASON FOR THIS COURT TO GRANT THE WRIT OF CERTIORARI 5

II. THE SECTION 2 FOURTH CLAIM: THE COURT BELOW DID NOT MISAPPLY TRANS WORLD AIRLINES, INC. v. INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS NOR OTHER DECISIONS OF THIS COURT .. 6

III. THE COURT BELOW DID NOT MISAPPLY SECTION 2 ELEVENTH 10

IV. CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Air Line Pilots Association v. Texas International Airlines, Inc., 656 F. 2d 16 (2nd Cir. 1981) 8

Air Line Pilots Association v. Transamerica Airlines, Inc., 817 F. 2d 510 (9th Cir. 1987) 8

Birkholz v. Dirks, 391 F. 2d 289 (7th Cir. 1968), *vacated as moot*, 395 U.S. 210 (1969) 11

Brotherhood of Locomotive Engineers v. The Kansas City Southern Railway Company, No. 93-2944, 1994 WL 202719 (8th Cir. May 26, 1994) ...3, 5, 8, 10

Carr v. Chicago Central and Pacific Railroad Company, No. 92-C-5943, 1994 WL 234567 (N. D. Ill. May 26, 1994), appeal pending, No. 94-2531, United States Court of Appeals for the Seventh Circuit 4, 5

Communications Workers v. Beck, 487 U.S. 735 (1988) 9

Ellis v. Brotherhood of Railway and Airline Clerks, 466 U.S. 435 (1985) 9

Felter v. Southern Pacific Co., 359 U.S. 326 (1959)..... 11

International Association of Machinists v. Northwest Airlines, Inc., 673 F. 2d 700 (3rd Cir. 1982) 8

NLRB v. Manitowoc Engineering Co., 909 F. 2d 963 (7th Cir. 1990)..... 9

O'Connell v. Erie Lackawanna Railroad, 391 F. 2d 156 (2nd Cir. 1968), *vacated as moot*, 395 U.S. 210 (1969) 12

Pattern Makers League v. NLRB, 473 U.S. 95 (1985) 9

TABLE OF AUTHORITIES – Continued

Page

Radio Officers Union v. NLRB, 347 U.S. 17 (1954)..... 9

Railway Labor Executives Association v. Hanson, 351 U.S. 225 (1956) 11

Ruby v. Taca International Airlines, S. A., 439 F. 2d 1359 (5th Cir. 1974)..... 8

Texas and New Orleans R. Co. v. Railway Clerks, 281 U.S. 548 (1930) 6, 8

Trans World Airlines, Inc. v. Independent Federation of Flight Attendants, 489 U.S. 426 (1989).....4, 6, 7, 10, 12

Virginian Railway Company v. System Federation, 300 U.S. 515 (1937) 4, 6, 8

STATUTES

The Railway Labor Act

Section 2 Fourth, 45 U.S.C. Section 152 Fourth .. *passim*

Section 2 Eleventh (a) and (c)..... 3, 4, 5, 9, 10, 11

Labor Management Relations Act .....

29 U.S.C. Section 8 (a)(3) 9

29 U.S.C. Section 8 (b).....9, 10

No. 93-2015

In The

Supreme Court of the United States

October Term, 1993

DENNIS T. DEMPSEY, RONALD E. SHAVER, RAYMOND E. YOUNG, A. W. FISH, G. W. GATTEN, RUSSELL N. ROGERS, R. J. WEBER, J. P. VALDEZ and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Petitioners,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, UNITED TRANSPORTATION UNION, and J. G. BAILEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondents United Transportation Union, and J. G. Bailey, joined by Respondent The Atchison, Topeka and Santa Fe Railway Company, respectfully request that the Court deny the Petition for a Writ of Certiorari submitted by Petitioners.

OPINIONS BELOW, JURISDICTION, AND STATUTORY PROVISIONS INVOLVED

Respondents accept Petitioners' identification as to Opinions below, Jurisdiction of the Court and Statutory Provisions Involved.

STATEMENT OF THE CASE

On July 6, 1992 The Atchison, Topeka and Santa Railway Company ("Santa Fe"), a carrier under the Railway Labor Act ("RLA"), 45 U. S. C. Section 151 *et seq.*, and United Transportation Union ("UTU"), a labor organization representing Santa Fe train service employees in collective bargaining under the RLA, entered into a letter agreement, Side Letter No. 11, whereby Santa Fe train service employees (interchangeably referred to as "ground" service employees) who do not pay full monthly dues to UTU after transferring out of train service to engine service will not "thereafter accumulate any additional" train service seniority while they remain outside the train service craft. While in train service, or upon return to train service, the agreement does not apply. (The pertinent agreement language appears in the Court of Appeals' opinion, Petitioners' Appendix, hereafter "App.", at 5a.) Contrary to Petitioners' "Question Presented", nothing in the disputed seniority accumulation agreement requires or allows Santa Fe to collect dues or deduct dues "from the wages of employees".

The Brotherhood of Locomotive Engineers ("BLE"), the collective bargaining representative of Santa Fe engineers, and eight individual Santa Fe employees sued

Santa Fe and UTU in the United States District Court for the Northern District of Illinois, claiming the agreement was invalid under Section 2 Fourth and Eleventh (c) of the RLA, 45 U. S. C. Section 152 Fourth and Eleventh (c), because it allegedly coerced train service employees to join the UTU and/or required membership in the UTU as a condition of continued employment.

On cross motions for summary judgment, the district court concluded that there was no violation of the RLA and dismissed the complaint, December 30, 1992. (App. 31a-44a, reported at 144 LRRM (BNA) 2551.) This dismissal was affirmed without dissent by the Court of Appeals for the Seventh Circuit, February 25, 1994 (App. 1a-28a), 16 F. 3d 832 (7th Cir. 1994), with unanimous denial of a request for reconsideration by the panel (App. 29a-30a).

SUMMARY OF THE ARGUMENT

The petition for a writ of certiorari should be denied because Petitioners have established no basis for review by this Court. First, the opinion below does not conflict with any other court of appeals decision. Every court to have considered the question has rejected Petitioners' RLA Section 2 Fourth and 2 Eleventh claims, including two Circuit Courts of Appeals, the Seventh and Eighth, and three district courts. In addition to the decisions of the court of appeals and district court below, the claims were rejected in *Brotherhood of Locomotive Engineers v. The Kansas City Southern Railway Co.*, No. 93-2944, 1994 WL 202719 (8th Cir. May 26, 1994), affirming No. 93-5073-CV-

SW-1, United States District Court for the Western District of Missouri, and in *Carr v. Chicago Central and Pacific Railroad Company*, No. 92-C-5943, 1994 WL 234567 (N. D. Ill. May 26, 1994), appeal pending, No. 94-2531, United States Court of Appeals for the Seventh Circuit. Indeed, in response to Petitioners' request below, no judge of the full Seventh Circuit Court of Appeals requested a vote on *en banc* hearing. (App. 29a-30a.)

Second, the court below properly applied the law under Section 2 Fourth and the decisions of this Court in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U. S. 426 (1989) and *Virginian Railway Co. v. System Federation*, 300 U. S. 515 (1937). Under these cases, Section 2 Fourth prohibits carriers from acting with anti-union animus and from attempting to undermine, impair, or destroy a bargaining relationship. As the court below noted, Petitioners showed neither the requisite anti-union animus nor any attack on the bargaining relationship of BLE and Santa Fe.

Third, the district court and Seventh Circuit properly found that RLA Section 2 Eleventh (c) has no application because that provision applies only where there is an agreement made pursuant to subparagraph (a), that is, one that requires union membership "as a condition of continued employment". The agreement at issue requiring union dues in order to continue to accumulate seniority while working outside the craft does not constitute an agreement requiring membership as a condition of continued employment but only as an option to accrue additional seniority while absent.

ARGUMENT AND AUTHORITIES FOR DENIAL OF THE WRIT

I. PETITIONERS HAVE PRESENTED NO CREDIBLE REASON FOR THIS COURT TO GRANT THE WRIT OF CERTIORARI

The most crucial failing in the Petition is that it does not identify a reason for this Court to review this matter. There is certainly no conflict among the Circuits; indeed, the two courts of appeals to address the issue have each firmly rejected Petitioners' position. In addition to the decision of the Court of Appeals for the Seventh Circuit in the present case, see *Brotherhood of Locomotive Engineers v. The Kansas City Southern Railway Co.*, No. 93-2944, 1994 WL 202719 (8th Cir. May 26, 1994). In both that Eighth Circuit case and the present case, the court of appeals affirmed summary judgment granted by the district court. A third district court has also granted summary judgment on the same legal basis in *Carr v. Chicago Central and Pacific Railroad Company*, No. 92-C-5943, 1994 WL 234567 (N. D. Ill. May 26, 1994), appeal pending, No. 94-2531, United States Court of Appeals for the Seventh Circuit.

Nor is there an "important issue of federal law. . . ." S. Ct. Rule 10. Petitioners' claims involve relatively arcane issues of RLA Section 2 Fourth and 2 Eleventh jurisprudence and do *not* involve the threat of substantial labor disputes, employment terminations or matters which are frequently litigated in federal court. The decision below simply requires an affected train service employee to pay dues to UTU in order to continue accruing train service seniority while working outside the

craft. This is not the type of substantial dispute that requires this Court's attention.

II. THE SECTION 2 FOURTH CLAIM: THE COURT BELOW DID NOT MISAPPLY *TRANS WORLD AIRLINES, INC. V. INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS* NOR OTHER DECISIONS OF THIS COURT

The court below did not misapply *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U. S. 426 (1989) and Section 2 Fourth. The court of appeals recognized that the primary thrust of Section 2 Fourth's prohibition of carrier "interference or coercion" concerned protection of employee rights of self-organization in the pre-certification period, that is, before a collective bargaining or union representative is identified or certified under the Act. In doing so, the court relied upon the precise language of *Trans World Airlines, Inc.* in which this Court noted:

> Section 2 Fourth was enacted as part of the 1934 amendments to the RLA. 48 Stat. 1185. From the time of our very first opportunity to interpret the 1934 amendments, *we have viewed them as addressing primarily the pre-certification rights and freedoms of unorganized employees.* In *Virginian R. Co. v. Railway Employees*, 300 U. S. 515 (1937), we observed that the employees' freedom "to organize and make choice of their representatives without the 'coercive interference' and 'pressure' of a company union . . . was continued and made more explicit by the amendment of 1934. *Id.*, at 543, citing § 2 Third, § 2 Fourth, and *Texas and N.O. R. Co. v. Railway Clerks*, 281 U. S. 548

> (1930). In *Switchmen's Union v. National Mediation Bd.*, 320 U. S. 297 (1943), the Court divided over whether the federal courts have jurisdiction under § 2 Fourth to review a certification of union representatives for collective bargaining by the National Mediation Board acting under § 2 Ninth of the RLA as amended in 1934. Both the majority and dissent agreed, however, that *"[t]he 1934 Act was directed particularly at control over the initial step in collective bargaining – the determination of the employees' representatives." Id.*, at 317 (Reed, J. dissenting); see also *id.*, at 302 (opinion of the Court); *Machinists v. Street*, 367 U. S. 740, 759 (1961).

489 U. S. at 440-41 (emphasis added).

The "explanation for this pre-certification focus" of Section 2 Fourth was that the RLA is designed to provide for private dispute resolution, and the effectiveness of this process "depends upon the initial assurance that the employees' putative representative is not subject to control by the employer. . . . " 489 U. S. at 439-40.

Nevertheless, the court below recognized that Section 2 Fourth was not exclusively concerned with pre-certification conduct of the employer. In accord with the general purpose of the 1934 amendment to protect the employees' choice of a bargaining agent, and in reliance upon *Trans World Airlines, Inc.* (which like the instant matter involved post-certification actions of the employer), the court below held that after certification, Section 2 Fourth prohibited employer conduct that would "strike a fundamental blow to union or employer activity and the collective bargaining process itself." The court

simply found no such evidence in the record to "rebut Santa Fe and UTU's showing of no anti-union animus." (App. 24a.)

Other Circuits that have addressed the scope of Section 2 Fourth have been in accord with the court below. In *Brotherhood of Locomotive Engineers v. The Kansas City Southern Railway Company, supra,* the Eighth Circuit Court of Appeals upheld a nearly identical seniority accumulation agreement under both Section 2 Third and Fourth concluding that, as to post-certification employer actions, anti-union animus or interference with the bargaining relationship of BLE was required but not shown. And elsewhere among the Circuits, Section 2 Fourth relief, whether denied or granted, has been deemed available in the post-certification period where there is a fundamental attack on the bargaining process or bargaining agent. *Compare International Association of Machinists v. Northwest Airlines, Inc.,* 673 F. 2d 700, 706 (3rd Cir. 1982) (limited rights outside the representational context); *Air Line Pilots Association v. Texas International Airlines, Inc.,* 656 F. 2d 16 (2nd Cir. 1981) (Section 2 Third or Fourth relief only where carrier threatens fundamental provisions of the law such as in company union cases, citing *Texas and New Orleans R. Co. v. Railway Clerks,* 281 U. S. 548 (1930) and *Virginian Railway Company v. System Federation,* 300 U. S. 515 (1937)) *with Air Line Pilots Association v. Transamerica Airlines, Inc.,* 817 F. 2d 510 (9th Cir. 1987), *cert. denied,* 484 U. S. 963 (1988) (diversion of bargaining unit work to subsidiary to eliminate bargaining unit altogether); *Ruby v. Taca International Airlines, S. A.,* 439 F. 2d 1359 (5th Cir. 1974) (removal of crew base to foreign country with likely destruction of bargaining altogether).

Further, the decision below was not in conflict with *Ellis v. Brotherhood of Railway and Airline Clerks*, 466 U. S. 435 (1984) and *Communications Workers v. Beck*, 487 U. S. 735 (1988) as Petitioners contend. (Petition, p. 16.) *Ellis*, arising under RLA, and *Beck* under the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 151 *et seq.*, involved issues concerning the statutory or constitutional rights of individuals to be free from paying dues to support non-collective bargaining activities of the labor organization. *Ellis* involved Section 2 Eleventh of RLA, not Section 2 Fourth, while *Beck* arose under LMRA as a duty of fair representation case although the Court relied upon Section 8(a)(3) in regard to the fair representation claim. Nevertheless, no fair representation claim exists in the present case, and Petitioners' seeming oblique invocation of that cause of action in attacking the Court below (Petition, p. 6), should be deemed of no consequence. Finally, in both *Ellis* and *Beck*, the agreements involved provided that membership was a condition of continued employment, a matter that we discuss *infra* in connection with the Section 2 Eleventh claim.

Because there is authority under the RLA interpreting and applying Section 2 Fourth in the limited fashion described, the Court below properly declined to rely upon additional LMRA cases that Petitioner cites, such as *Radio Officers Union v. NLRB*, 347 U. S. 17 (1954) (involving LMRA Section 8(a)(3) and 8(b), the latter of which has no counterpart at all under RLA), *Pattern Makers League v. NLRB*, 473 U. S. 95 (1985) (involving LMRA Section 8(b) which has no counterpart under RLA), or the Seventh Circuit's *NLRB v. Manitowoc Engineering Co.*, 909 F. 2d 963 (7th Cir. 1990) (involving again LMRA Section 8(a)(3) and

8(b)). This Court has consistently said that while "carefully drawn" analogies from LMRA may be looked to for guidance under RLA, the LMRA "cannot be imported wholesale" into RLA. *Trans World Airlines, Inc.* at 439. As described, Section 2 Fourth has its own distinct history that has established the scope of employer conduct prohibited.[1]

Accordingly, the court below did not misapply *Trans World Airlines, Inc.* nor misinterpret Section 2 Fourth.

III. THE COURT BELOW DID NOT MISAPPLY SECTION 2 ELEVENTH

Petitioners claim that Section 2 Eleventh (c) prohibits the agreement at issue. (Petition, pp. 23-28.) Petitioners' argument in this regard, however, skips over the crucial matter relied upon by the court below that subparagraph (c) is only a qualifier to subparagraph (a) of Section 2 Eleventh. The qualifier of (c) only operates in regard to an agreement made pursuant to subparagraph (a). Subparagraph (a) concerns agreement requiring union membership where such is a "condition of continued employment". Both courts below, as well as the Eighth Circuit and district court in *Brotherhood of Locomotive Engineers v. Kansas City Southern Railway Co., supra,* concluded

---

[1] At page 23 of the Petition it is suggested that Section 2 Fourth addresses claims against a labor organization as well as an employer under RLA. Section 8(b) of the LMRA addresses labor organization conduct; but the plain language of Section 2 Fourth demonstrates that it does not.

that the seniority agreement here did not create a condition of continued employment. The train service employees working in engine service would continue working there, and would simply have the option of accumulating further train service seniority while outside train service upon payment of dues to the UTU (the train service bargaining agent).

Likewise, the court below properly rejected Petitioners' unwarranted speculative attempts to tie the agreement in issue to the traditional "union shop" agreement of Santa Fe-UTU, or to speculate as to what consequences might follow from implementation of the challenged agreement. Petitioners' arguments that (1) the disputed agreement was a kind of "union shop" agreement, that is, an agreement requiring membership as a condition of continued employment ("The union shop is a variant of the closed shop, since union membership is required of every employee . . . ", *Railway Labor Executives v. Hanson*, 351 U. S. 225, 231, fn. 3 (1956)), because it was a "signal or euphemism" regarding dues payment (Petition, p. 23), and, (2) that the disputed agreement was really one with a condition of continued employment or a union shop because of other agreements concerning layoffs (Petition, p. 23), did not make the seniority accumulation agreement more than it was. It did not make the seniority accumulation agreement into an agreement with a "condition of continued employment". Thus it was not made pursuant to Section 2 Eleventh (a) and hence the subparagraph (c) qualifier upon which Petitioners' claim is based was not pertinent.

Finally, Petitioners' reliance upon *Felter v. Southern Pacific Co.*, 359 U. S. 326 (1959), *Birkholz v. Dirks*, 391 F. 2d

289 (7th Cir. 1968), *vacated as moot*, 395 U. S. 210 (1969), and *O'Connell v. Erie Lackawanna Railroad*, 391 F. 2d 156 (2nd Cir. 1968), *vacated as moot*, 395 U. S. 210 (1969) (Petition, pp. 25-28), is misplaced since those cases concerned agreements where union membership was a "condition of continued employment."

IV. CONCLUSION

The decision below was in accord with language of Section 2 Fourth and Eleventh, this Court's decision in *Trans World Airlines, Inc.*, the widespread cited authority of the Circuits, and the decision of every court to have considered the issues presented in the Petition. Thus, the Petition should be denied.

Respectfully submitted,

NORTON N. NEWBORN
(Counsel of Record)
NORTON N. NEWBORN CO., L. P. A.
24100 Chagrin Blvd., Suite 330
Cleveland, Ohio 44122
(216) 464-1400

PATRICK J. HARRINGTON
HARRINGTON THOMPSON ACKER
& HARRINGTON LTD.
Suite 2000
310 S. Michigan Avenue
Chicago, Illinois 60604

Counsel for Respondents United Transportation Union and J. G. Bailey

J. STEPHEN POOR
(Counsel of Record)
DAVID J. ROWLAND
SEYFARTH, SHAW, FAIRWEATHER &
GERALDSON
Suite 4200
55 East Monroe St.
Chicago, Illinois 60603
(312) 346-8000

Counsel for Respondent The Atchison, Topeka and Santa Fe Railway Company

(3)

Supreme Court, U.S.
FILED
AUG - 1 1994
OFFICE OF THE CLERK

No. 93-2015

In The

Supreme Court of the United States

October Term, 1994

DENNIS T. DEMPSEY, RONALD E. SHAVER, RAYMOND E. YOUNG, A. W. FISH, G. W. GATTEN, RUSSELL N. ROGERS, R. J. WEBER, J. P. VALDEZ and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Petitioners,

v.

THE ATCHISON, TOPEKA and SANTA FE RAILWAY COMPANY, UNITED TRANSPORTATION UNION and J. G. BAILEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

HAROLD A. ROSS
(Counsel of Record)
ROSS & KRAUSHAAR CO., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113-1740
(216) 861-1313

Counsel for Petitioners

12 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PETITIONERS' REPLY BRIEF 1

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES:

Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952) 7

Communications Workers v. Beck, 487 U.S. 735 (1988) 3

DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983) 3

Ellis v. Brotherhood of Railway and Airline Clerks, 466 U.S. 435 (1984) 3

Felter v. Southern Pacific Co., 359 U.S. 326 (1959)..... 7

Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) 3

Hawaiian Airlines, Inc. v. Norris, 512 U.S. ___, 62 U.S.L.W. 4537 (U.S. June 20, 1994) 1, 2

International Union of Electronic Workers, Local 444 (Paramax Systems Corp.), 311 N.L.R.B. No. 105 (1993) 4

Jones v. Trans World Airlines, Inc., 495 F.2d 790 (2nd Cir. 1974) 4

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988) 2

McElroy v. Terminal Railroad Ass'n of St. Louis, 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 813 (1969) 7

Radio Officers Union v. NLRB, 347 U.S. 17 (1954) ... 4, 5, 6

Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) 3

Taylor v. Missouri Pacific R.R., 794 F.2d 1082 (1986), *cert. denied*, 479 U.S. 1018 (1986) 7

TABLE OF AUTHORITIES – Continued

Page

Trans World Airlines v. Flight Attendants, 489 U.S. 426 (1989) 1, 5, 6, 7

United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) 3

STATUTES:

Labor Management Relations Act Section 301, 29 U.S.C. §185 2

National Labor Relations Act, 29 U.S.C. §§151 *et seq* ..... *passim*

Section 7, 29 U.S.C. §157 3

Section 8(a)(3), 29 U.S.C. §158(a)(3) 4

Railway Labor Act, 45 U.S.C. §§151 *et seq* ..... *passim*

Section 1a, 45 U.S.C. §151a 3

Section 2 Third, 45 U.S.C. §151 Third 4

Section 2 Fourth, 45 U.S.C. §152 Fourth ..... *passim*

Section 2 Eleventh, 45 U.S.C. §152 Eleventh 4, 6

Section 2 Eleventh (c), 45 U.S.C. §152 Eleventh(c) 4

No. 93-2015

In The

Supreme Court of the United States

October Term, 1994

DENNIS T. DEMPSEY, RONALD E. SHAVER, RAYMOND E. YOUNG, A. W. FISH, G. W. GATTEN, RUSSELL N. ROGERS, R. J. WEBER, J. P. VALDEZ and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Petitioners,

v.

THE ATCHISON, TOPEKA and SANTA FE RAILWAY COMPANY, UNITED TRANSPORTATION UNION and J. G. BAILEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

A. The opinion of this Court on June 20, 1994, in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. ___, 62 U.S.L.W. 4537 (U.S. June 20, 1994), ("Norris"), reinforces our submission that the decision below, which rests on an expansive application of *Trans World Airlines v. Flight Attendants*, 489 U.S. 426 (1989), and a refusal to follow the well-established contrary precedent under the National

Labor Relations Act ("NLRA"), 29 U.S.C. §§151 *et seq.*, merits plenary review by this Court.

In *Norris*, the Supreme Court of Hawaii found that the Railway Labor Act ("RLA"), 45 U.S.C. §§151 *et seq.*, did not pre-empt an airline employee's state tort claims of retaliatory discharge. In reaching that conclusion, the court relied upon this Court's decision in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), which involved Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, and held that a claim of wrongful termination arising from the employee's filing of a state worker's compensation claim did not require an interpretation of the collective bargaining agreement and, being independent of the labor contract, was not pre-empted by Section 301. Notwithstanding the distinct differences between the two statutes and the mandatory arbitration mechanisms provided in the RLA, the Court "adopt[ed] the *Lingle* standard to resolve claims of RLA pre-emption." *Norris*, 62 U.S.L.W. at 4542. In so doing, the Court provided the following authoritative test for determining whether determinations under the NLRA set the standard in RLA cases:

> It is true, as petitioners observe, that the RLA and the LMRA are not identical in language, history, and purpose. The LMRA, unlike the RLA, does not mandate arbitration, nor does it prescribe the types of disputes to be submitted to arbitration under bargaining agreements. Nonetheless, the common purposes of the two statutes, the parallel development of RLA and LMRA pre-emption law, see, *e.g.*, *International Assn. of Machinists v. Central Airlines*, 372 U.S. 682, 691-692 (1963); *Allis Chalmers v. Lueck*, 471

> U.S. 202, 210 (1985), and the desirability of having a uniform common law of labor law preemption, *cf. Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383-384 (1969), support the application of the *Lingle* standard in RLA cases as well. (*Id.* at n.9).

The Court of Appeals' decision is incompatible with each of these three test points. First, both Section 1a of the RLA, 45 U.S.C. §151a, and Section 7 of the NLRA, 29 U.S.C. §157, contain common purposes with respect to the factual situation herein: freedom of association and stability of collective bargaining relationships. *See, e.g., DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 171 (1983), quoting from *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981). Second, the decision below failed to acknowledge the parallel and identical development of RLA and NLRA law upon the nondiscriminatory assessment of monies from employees for the collective bargaining purposes of the bargaining agent. In *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944), the Court implied the duty of fair representation upon unions from a reading of Section 2 Fourth of the RLA, 45 U.S.C. §152 Fourth. This duty of fair representation of all members of the craft was extended to employers and employees covered by the NLRA in *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). In *Ellis v. Brotherhood of Railway and Airline Clerks*, 466 U.S. 435 (1984), the Court held that a railroad employee could not be required by an agreement made pursuant to Section 2 Eleventh of the RLA to pay fees and assessments to the bargaining agent that were not related to its collective bargaining activities. Subsequently, in *Communications Workers v. Beck*, 487 U.S. 735 (1988), the

Court concluded Section 2 Eleventh of the RLA and Section 8(a)(3) of the NLRA are statutory equivalents and held that employees under the NLRA may be required to pay only those fees and dues necessary for the representative of the employees to deal with the employer on labor-management issues. *Id.*, 762. The contractual language in this case implicates the fundamental statutory rights owed employees pursuant to the UTU's fiduciary duty of fair dealing to the members of the train service crafts, as set forth in Sections 2 Third and Fourth of the RLA, as well as the carrier's obligation under Section 2 Fourth to take no action "to assist in the collection" of fees and assessments of the nature herein to UTU, unless pursuant to lawful union security agreements as provided in Section 2 Eleventh, which would include the statutory prohibition upon compulsory dual unionism set forth in subparagraph (c) of Section 2 Eleventh. This dual rationale or incorporation of the duty of fair dealing into the proper assessment and collection of union fees has underlined the application by the National Labor Relations Board of Section 8(a)(3) of the NLRA in situations, like that before the Court, which are governed by the Court's decision in *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954). *See, e.g., International Union of Electronic Workers, Local 444 (Paramax Systems Corp.)*, 311 N.L.R.B. No. 105 (1993). *See also Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 798 (2nd Cir. 1974), a RLA case holding "union membership [is] not a proper ground for determining seniority." Third, uniform common law on seniority protection fees has the same desirable effects under both statutes: protection of the involved bargaining representative against free riders, protection of the

individual employee's freedom of association and freedom from compulsory dual unionism, increased potential for negotiated agreements, and reduction in possible disruptions to rail service arising from increased tensions between employees ebbing-and-flowing between the engine and train service crafts.

In meeting these requirements, it appears that the Court of Appeals should have, but did not, look to the decisions of this Court and the various Courts of Appeals that have ruled upon the payment of fees and other devices for seniority maintenance and accumulation as prohibited activities that encourage union adherence or membership. From that standpoint, as well as defining the proper standard to be used in determining whether NLRA decisional precedent should be applied in a similar situation arising under the RLA, this case raises a question of recurring importance to the parties, to other railroads, to the various railway unions, and to federal agencies applying the RLA, which requires the guidance that only this Court can authoritatively give.

B. Respondents make no effort to distinguish this case from *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954), and the NLRA cases following it. Rather, they continue to rely upon a reading of *Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. 426 (1989), as always requiring a showing of anti-union animus or employer interference with the intentional or avowed purpose of interfering with the union's bargaining agency in any post-certification conduct. *Trans World Airlines*, however, was a strike crossover case. It did not deal with the conduct of a carrier with one bargaining representative which "inherently encourages or discourages union membership" in a

second bargaining representative that the employer is obligated to meet and treat with under the RLA. *Radio Officers Union v. NLRB*, 347 U.S. *supra*, at 45. Moreover, respondents fail to acknowledge that *Trans World Airlines* dealt with Section 2 Fourth in the context of the exercise of an employer's economic self-help powers after exhaustion of the RLA dispute resolution procedures and then only in regard to the proposition that "[n]either the RLA itself nor any analogies to the NLRA indicate that the crossover policy adopted by TWA during the period of self-help was unlawful." *Id.*, 443. In addition, two factors arise here that were not present in that case. By reason of the fact that payment of the "full monthly dues" will satisfy both UTU's seniority protection scheme and the union shop provisions in effect, the transferred train service employees will no longer "continue to bear the burden of paying" union dues to BLE, as bargaining representative for the craft of locomotive engineers. Unlike the situation in *Trans World Airlines*, the transferees are not foreclosed from "[f]ree riding on the benefits that may come to these employees as a result of [BLE's] status" as the engineers' bargaining representative. *Id.* at 436 n.2. Likewise, there is a clear "prospect of a continuing diminution of seniority" after transfer, unless "full monthly dues" are paid UTU. *Id.*, 437. These references in *Trans World Airlines, Inc.*, establish that the specific showing of anti-union animus against the second union in this scenario is not a prerequisite to determining the validity of the labor contract under Sections 2 Fourth and Eleventh of the RLA. In fact, this Court has decided on a number of previous occasions that RLA contract validity questions are for the courts, that the courts could

determine validity through declaratory relief without a prior showing of anti-union animus and, if invalid under the RLA, can exercise their injunctive powers to enforce the commands of the RLA. *See Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768, 774 (1952); *Felter v. Southern Pacific Co.*, 359 U.S. 326, 327 n.3 (1959). *Also see, McElroy v. Terminal Railroad Ass'n of St. Louis*, 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 813 (1969); *Taylor v. Missouri Pacific R.R.*, 794 F.2d 1082 (1986), *cert. denied*, 479 U.S. 1018 (1986).

In sum, respondents have offered no justification whatsoever for defining "condition of employment" as used in the two statutes differently or for denying these employees covered by the RLA the treatment according employees under the NLRA relative to the payment of fees to the union while forced to transfer out of one craft to work in another. A carrier and one union should not be entitled by agreement to deprive a railroad employee of his association choice and his employment rights in violation of the commands of the RLA, and it is not the function of a court of appeals to limit this Court's precedents by expanding a decision (*Trans World Airlines, Inc.*), when that decision itself expressly looked to NLRA precedents.

CONCLUSION

For these reasons and those stated in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

HAROLD A. ROSS
(Counsel of Record)
ROSS & KRAUSHAAR CO., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113-1740
(216) 861-1313

Counsel for Petitioners